115-321

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 499.

THE CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED FEBRUARY 18, 1884.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

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1 To the Honorable Thos. F. Hargis, chief justice of the court of appeals of the Commonwealth of Kentucky:

The Chesapeake, Ohio & Southwestern Railroad Company respectfully petitioning would show as follows:

That your petitioner is a duly incorporated company, organized under the laws of the State of Tennessee, and under an act of Assembly of the Commonwealth of Kentucky, owns and exercises certain rights and franchises in that State, and as intended and authorized by the statutes of both said States your petitioner owns and operates a line of railway lying partly in each of said States.

That heretofore a suit was commenced in the circuit court of Franklin county, Kentucky, by the Commonwealth of Kentucky as plaintiff against your petitioner as defendant to recover from petitioner the sum of about $6,483.00, alleged to be due said Commonwealth as and for account of taxes for the year 1882, claimed to have been assessed for that year against your petitioner's line of railroad within its borders by the board of railroad commissioners of that Commonwealth.

That said suit was taken by appeal to the court of appeals of Kentucky, which is the highest court of that State in which a decision in the suit could be had, and in that court a judgment was rendered on the 18th day of December, 1883, against your petitioner for the amount of the said Commonwealth's claim, to wit, the sum of $6,483.00 and costs. Said judgment is final and no appeal
2 lies therefrom.

That a full transcript of the record in said suit is herewith presented and the same is made a part of this petition, being duly authenticated.

That as appears from said record of said suit your petitioner therein denied the validity of certain statutes of said Commonwealth of Kentucky upon which the plaintiff in said suit based its right to recover, your petitioner pleading that said statutes were repugnant to the Constitution of the United States, and said decision and judgment of said court of appeals in said suit was in favor of their validity.

Said statutes of Kentucky are the act of 3rd April, 1878, entitled "An act to prescribe the mode of ascertaining the value of the property of railroad companies for taxation and for taxing same," and the act of 6th April, 1882, entitled "An act to prevent extortion and discrimination in the transportation of freights and passengers by railroad corporations, and in aid of that purpose to establish a board of railroad commissioners and define its duties and powers," and the act of 19th April, 1882, entitled "An act to amend an act to prescribe the mode of ascertaining the value of property of railroad companies for taxation and for taxing the same," approved April 3rd, 1878.

By virtue of which statutes said Commonwealth assumed to invest the board of railroad commissioners with absolute power
3 to increase the value of the properties of railway companies for taxation arbitrarily and without notice or due process

of law, and from whose decision no appeal was allowed, when by the general statutes of that State the properties of all other persons were protected from arbitrary assessments by enactments providing that notice should be given before even proof was heard tending to show that the value of same for taxation should be increased, as well as that every other person other than railroad corporations should have the right to an appeal on all matters touching the valuation and assessment of his property for taxation from the action of the assessor and the supervisors to the county court and to the circuit court, and when by the constitution of that State taxation under the authority thereof must be equal and uniform, and by the Constitution of the United States "No State shall make or enforce any law which should abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

All of which appears in full in the record and proceedings in said suit, as shown by the said transcript thereof, herewith exhibited; and in said final decision thereof manifest error hath been done, to the great damage of your said petitioner.

Wherefore said company prays for the allowance of a writ of error, and such other process as may cause the same to be
4 corrected by the Supreme Court of the United States.

HOLMES CUMMINGS, *Attorney.*

Allowed.

THOMAS F. HARGIS.

Chief Justice of Kentucky.

5 *Assignment of Errors.*

THE CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD COMPANY

vs.

THE COMMONWEALTH OF KENTUCKY.

The court erred in sustaining the validity of the statute of the Commonwealth of Kentucky entitled An act to prescribe the mode of ascertaining the value of the property of railroad companies for taxation and for taxing the same, "approved April 3rd, 1878," when the same was repugnant to the Constitution of the United States.

2. The court erred in sustaining the validity of an act of the Commonwealth of Kentucky entitled An act to amend an act to prescribe the mode of ascertaining the value of railroad property for taxation and for taxing the same, "approved April 19th, 1882," because said act was repugnant to the Constitution of the United
6 States, in that said act attempted to confer powers in violation of the provisions of the Federal Constitution.

3. The court erred in sustaining said statutes, because no State can make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal pro-

tection of the laws, when by said statutes plaintiff in error was deprived of its property without due process of law, and was denied the equal protection of the law guaranteed and granted to other citizens.

4. The court erred in affirming the judgment of the circuit court of Franklin county, Kentucky, in rendering judgment against plaintiff in error.

HOLMES CUMMINS,
Att'y for Pl'ff in Error.

7 Pleas before the Hon. Thomas F. Hargis, chief justice, and Hon. Thomas H. Hines, Hon. Wm. S. Prayor, and Hon. Joseph H. Lewis, associate judges of the court of appeals of Kentucky, at the city of Frankfort, the ca-ital of the State of Kentucky, on the 18th day of December, 1883.

Be it remembered that on the 2nd day of July, 1883, the appellants, The Chesapeake, Ohio and Southwestern Railroad Company, filed in the clerk's office of the court of appeals of Kentucky the following transcript:

Kentucky Franklin Circuit Court.

Proceedings before the Hon. P. U. Major, judge of the court aforesaid, at the court-house, in the city of Frankfort, on the 2nd day of March, 1883.

Be it remembered that on the 25th day of January, 1883,
8 the att'y general filed in the clerk's office of the court aforesaid the following petition:

Petition.

Franklin Circuit Court.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
THE CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD COMPANY.

The plaintiff states that the defendant is a railroad company and corporation, and is and was, during the year 1882, the owner of and operating a line of railway lying in the State of Kentucky.

Plaintiff states that the defendant, for the purpose of assessment and taxation for the year 1882, reported to the auditor of public accounts of the State of Kentucky, as required by law, the total length of said road owned and operated by it, and the value thereof per mile, and also reported its other property subject to taxation and the value thereof. The total value of said line of road, including sidings, engines, cars, depot grounds, improvements, and other real estate as reported, was ——— dollars.

9 Plaintiff states that after said report and valuation was made to the auditor, as aforesaid, by defendant, the board of railroad commissioners, who, by law, constitute a board of equalization to value and assess for taxation the railroad property of the

State, after being sworn as required by law, met on the first day of September, 1882, at the office of the auditor, in Frankfort, Ky., and, with a majority of said board present constituting a quorum, the auditor placed before them the valuation and returns and report of defendant's taxable property made as aforesaid to him by defendant.

Plaintiff states that said board continued its sessions from day to day as provided by law, of which defendant had due notice; and plaintiff avers that the defendant did appear before said board, by its officers, agents, and attorneys, and presented to said board such facts, figures, and information and argument in relation to the valuation and assessment for taxation of its said property as it saw proper to. Plaintiff states that said board after a full hearing of defendant by her officers, agents, and attorneys, and a full consideration of said returns, reports, information, and arguments before them, valued and assessed for taxation for the year 1882 the defendant's lines of road lying in the State of Kentucky, the same reported by the defendant to the auditor, together with its engines, cars, depot grounds, improvements, and other real estate at the sum of $13,261.98, and on the — day of September, 1882, returned and filed with the auditor of public accounts the record of said assessment and valuation, signed and attested as provided by law; a certified copy of which is filed herewith as part hereof marked (X).

Plaintiff states that the auditor of public accounts, before the 10th day of October, 1882, duly notified defendant of the amount of its assessment for taxation, and, as required by law, opened an account with defendant, charging it with the sum of $13,261.98, the amount of tax due the Commonwealth of Kentucky upon said assessment and valuation of defendant's line of road and property for the year 1882, at 47½ cents on the one hundred dollars, which is the rate of taxation on such property, and upon all other real estate of the Commonwealth. A certified copy of said account is filed herewith as part hereof marked (Z).

Plaintiff says that the defendant is indebted to her in the sum of $13,261.98, taxes due as aforesaid, with interest from the 10th day of October, 1882, no part of which has been paid except the sum of $6,778.32, paid January 5, 1883. Wherefore plaintiff prays judgment for said debt and interest, subject to the credit aforesaid, and for her costs and for all proper relief.

P. W. HARDIN,
Att'y Gen'l.

The paper marked (X), referred to in the above petition, cannot be found among the papers.

Auditor's Acc't.

OFFICE OF AUDITOR OF PUBLIC ACCOUNTS.
FRANKFORT, KY., *January 23rd*, 1883.

Chesapeake, Ohio & Southwestern R. R. Co., Dr.

	1882.			
12	Oct.	10.	To State taxes for 1882 on $2,791,994, @ 47½ cents on each $100 worth of property	$13,261 98
	1883.			
	Jan'y	5.	By check on account	6,778 22
			Balance due	$6,483 76

As shown by the report of the railroad commissioners of Kentucky, a copy of which follows:

STATE OF KENTUCKY.

Chesapeake, Ohio & Southwestern R. R. Co.

273 miles @ $10,000, including sidings and rolling stock	$2,730,000	
Other property	61,994	
		$2,791,994 00

I hereby certify that the foregoing account is correct as shown by the books on file in this office, and that the same has not [been] paid, except the sum of $6,778.22, which is been duly credited thereon.

FAYETTE HEWITT, *Auditor.*

Summons.

The Commonwealth of Kentucky to the sheriff of Jefferson county, Greeting:

You are commanded to summons The Chesapeake, Ohio and Southwestern Railroad Company to answer on the first day of the next February term of the Franklin circuit court a petition
13 filed against it in said court by the Commonwealth of Kentucky, and warn it that upon failure to answer the petition will be taken for confessed, or it will be proceeded against for contempt, and you will make due return of this summons on the first day of the next February term of said court.

Witness W. Franklin, clerk of said court, this 25th day of January, 1883.

W. FRANKLIN, *C. F. C. C.*

Came to hand January 26th, 1883, at 3.50 oclock p. m.

Executed on Chesapeake, Ohio & S. W. R. R. January 27th, 1883, by delivery of a true copy of the within to John Echols, its vice-president, he being chief officer in this county.

J. D. BARBOUR, *S. J. C.*,
By WM. CLARK, *D. S.*

She. fee, 60c.

Answer Filed.

At a court held on the 7th day of Feb'y, 1883, the defendant appeared and filed its answer.

Answer.

In the Circuit Court of Franklin County, Kentucky.

THE COMMONWEALTH OF KENTUCKY, Plaintiff,

vs.

THE CHESAPEAKE, OHIO & SOUTHWESTERN R. R. Co., Defendant.

In this case said defendant comes and for answer to plaintiff's petition says:

14 First. It is true, as the plaintiff states, that the defendant is a railroad company and corporation, and is and was during the year 1882 the owner of and operated a line of railway lying partly in said State.

It is also true that defendant reported to the auditor, etc., a full list and schedule of all its properties and assets, and of the value thereof for the purpose of the assessment thereof for taxation for the year 1882 as alleged in the petition. The aggregate valuation of said properties and assets as shown by said returns was $———.

That defendant has no knowledge nor sufficient information to enable it to form a belief as to the statements in the petition that the board of railroad commissioners were sworn, nor whether said board met on the — day of September, nor whether said auditor placed before said board said schedule, returns, and valuations of its properties made by defendant, neither does defendant know, nor has it sufficient information to enable it to form any belief as to any act done or step taken by said board as to any valuation or assessment for taxation by it of defendant's property for taxation for the

15 year 1882. However defendant denies that due notice was given to it of any session or meeting of said board; and further denies that it appeared before said board, by or through its officers, agents, or attorneys, or presented any facts, figures, information, or argument in relation to the valuation and assessment of its property for taxation; and further denies that defendant had any hearing before said board as to any of said matters. It is true that on the 5th day of January, 1883, defendant paid said sum of $6,778.22 to the plaintiff, which payment was made on the distinct statement and understanding that said sum of $6,778.22 was the full amount of State taxes, at the rate of 47½ cents on each hundred dollars, on said sum of $——— the aggregate valuation of defendant's property for taxation as shown upon said schedule filed by the defendant with the auditor as above stated. At and before making such payment defendant presented and filed with the auditor of public accounts of the plaintiff a written statement of the purpose and intent of

16 said payment, a true copy of which, and of said auditor's receipt, etc., are herewith filed as parts of this answer to all intents and purposes. Same are marked Exhibits A & B hereto.

2nd. And for further answer to the plaintiff's petition defendant

says that said so-called board of railroad commissioners, or board of equalization, has no legal existence or authority in this State, and could do no legal act as to the valuation or assessment of defendant's property for taxation such as the plaintiff states that said board has done. The act of Assembly constituting said board of railroad commissioners, etc., is unconstitutional, null, and void; the act of Assembly constituting said board of equalization is also unconstitutional, null, and void. And there has been no other legal valuation of defendant's said property for taxation for said year than that so returned by it to the auditor, nor any further step taken for the assessment thereof, etc.; said act of the Assembly creating *creating* said board of railroad commissioners constitutes such board a court with
17 judicial powers and functions, and grants it an exclusive jurisdiction; while again it is pretended to exercise the ministerial office of assessing property for taxation. Said act of Assembly, under which plaintiff states said board acted in making said pretended assessments of defendant's property, provides for no notice to defendant of any assessment for taxation of its property by said board, nor any opportunity for it to be heard, nor to appeal from a review any action of said board affecting defendant or its property.

Defendant says that these acts of Assembly are each and all unconstitutional, null, and void, and nothing done thereunder can bind this defendant, the same being in conflict with and repugnant to the constitution of this Commonwealth, and the clauses of the Constitution of the United States.

W. C. P. BRECKENRIDGE,
HOLMES CUMMINS,
Att'ys for Defendant.

The facts stated in foregoing answer are believed to be full and true; I am the vice-president of the defendant.

CHESAPEAKE, OHIO & S. W. R. R. CO.,
By JOHN ECHOLS, *V.-P.*

18 Sworn to and subscribed before me, this 2nd day of February, 1883, by John Echols, V.-P., C., O. & S. W. R. R. Co.

JOHN B. HUNDLEY, *N. P. J. Co.*

EXHIBIT "A."

MEMPHIS, TENN., *Jan'y* 4, 1883.

Hon. Fayette Hewitt, Auditor of Public Accounts of the State of Kentucky.

DEAR SIR: The Chesapeake, Ohio & Southwestern Railroad Company herewith hands you $6,778.22 on account of State taxes for the year 1882 on its property in the State of Kentucky, for which you will please execute and deliver the proper receipt. This company is willing to pay the legal rate of taxation on said property upon its valuation thereof for State taxation for the year 1882, which it returned to you as auditor of public accounts of said State, regarding said returns as the only legal valuations and assessments of said

property for State taxation for the year 1882, its valuation so returned being in the aggregate $———, and the payment of $——— herewith made you is the full amount due upon said
19 aggregate valuation of $———, at the rate of 47½ cents on the hundred dollars. But it denies the legal validity of the assessment and valuation of the said property made by the board of railroad commissioners of the State for taxation for 1882, and of the taxes claimed thereon, and protests that it is not bound thereby, and it makes this payment with the express intention, reservation, and understanding on its part that it shall not be taken or construed as an acquiesscence in or an admission of the legal validity of the said assessments and valuation made by the board of railroad commissioners or the taxes claimed thereon, and this payment is made with a reservation of all its legal rights, in respect of the said assessments and valuations of said commissioners and the taxes claimed thereon. You will please note this statement and protest, together with the receipt of said money.

Very respectfully,

THE CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD COMPANY,

By HOLMES CUMMINS, *Its Attorney.*

20 EXHIBIT "B."

OFFICE AUDITOR OF PUBLIC ACCOUNTS,
FRANKFORT, *Jan'y* 5, 1883.

Received of John Echols, vice-president of Chesapeake, Ohio and Southwestern R. R. Co., the treasurer's receipt for six thousand seven hundred and seventy-eight $\frac{22}{100}$ dollars in part payment of tax on the above corporation for 1882. The total amount of tax assessed against the corporation for said year being $13,261.98, and the amount being paid with a protest against the payment of the balance of said sum.

Check, $6,778.22.—3 qu.

FAYETTE HEWITT, *Auditor.*

Demurrer to Answer Filed.

At a court held on the 20th day of Feb'y, 1883, the attorney general filed a demurrer to defendant's answer.

Demurrer to Ans.

Franklin Circuit Court.

COMMONWEALTH OF KENTUCKY
vs.
THE CHESAPEAKE, OHIO & SOUTHWESTERN R. R. CO.

The plaintiff demurs to the defendant's answer herein, be-
21 cause it does not state facts sufficient to support a defense to the petition.

P. W. HARDIN,
Att'y Gen'l.

Demurrer to Answer Sustained.

At a court held on the 1st day of March, 1883, the matters of law arising on the demurrer to the answer being heard, the court sustained the demurrer, and defendant excepts.

Part of Ans. Withdrawn.

At a court held on the 2nd day of March, 1883, upon motion of defendant so much of its answer herein as makes an issue of fact is hereby withdrawn, and by consent this order relates back prior to the filing of the demurrer, it having been so understood and agreed at the time of the demurrer.

Judgment.

The demurrer to the answer having been heretofore sustained and the defendants declining to answer further, it is now adjudged that the plaintiff recover of the defendant the sum of $13,261.22, with interest at the rate of six p-r cent. per annum from the 10th day of Oct., 1882, until paid, subject to a credit of $6,778.22 paid Jan'y
22 5th, 1883, and that plaintiff also recover of defendant 2 per cent. on the amount of principal and interest of this judgement, being for attorney general's fee; also the cost of the proceedings.

Appeal Granted.

The defendant excepts to this judgement and prays an appeal to the court of appeals, which is granted.

On the 8th day of March, 1883, the following assignment of errors and schedule were filed in the clerk's office:

Assignment of Errors and Schedule.

Franklin Circuit Court.

COMMONWEALTH OF KY.
vs.
THE CHESAPEAKE, OHIO & SOUTHWESTERN R. R. CO.

The defendant comes and *for* assigns for errors herein:

1st. The court erred in sustaining the plaintiff's demurrer to the defendant's answer and to each of the paragraphs thereof.

2nd. The court erred in overruling the defendant's demurrer to the plaintiff's petition.

3rd. The court erred in rendering the judgement against
23 the defendant, from which the appeal to the court of appeals has been granted.

HOLMES CUMMINS,
W. C. P. BRECKENRIDGE,
For Def't.

Schedule.

For the purpose of the appeal in the above-styled case the clerk will copy the entire record.

HOLMES CUMMINS &
W. C. P. BRECKENRIDGE.

Kentucky Franklin Circuit Court Office.

I, W. Franklin, clerk of the court aforesaid, do certify that the foregoing 13 pages and above lines contain a full, true, and complete transcript of the record and proceedings had in the case therein mentioned, so far as the same is now on file in said court.

Witness my hand, this 14th day of March, 1883.

W. FRANKLIN, *C. F. C. C.*

Fee for record, $3.00.

Statement.

Court of Appeals.

CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD CO., Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

This appeal is to stand on the docket as above set out.

24 The judgment was rendered by the Franklin circuit court on the 1st day of March, 1882, and will be found on page 12. The appeal was granted below, and no process is desired.

HOLMES CUMMINS.
W. C. P. BRECKENRIDGE.

And afterwards, to wit, at a court of appeals continued and held for the Commonwealth of Kentucky, at the capital, in the city of Frankfort, on the 2nd day of October, 1883:

Order C't App'ls.

This day this cause came on to be heard, and was argued by C. B. Simrall for appellant, and laid over for further argument.

And afterwards, to wit, at a court of appeals continued and held for the Commonwealth of Kentucky, at the capital, in the city of Frankfort, on the 3rd day of October, 1883:

Order C't App'ls.

This day this cause came on for hearing, and was argued by A. Duvall for appellee, and laid over for further argument.

25 And afterwards, to wit, at a court of appeals continued and held for the Commonwealth of Kentucky, at the capital, in the city of Frankfort, on the 4th day of October, 1883:

Order C't Ap'ls.

This day this cause came on for hearing, and was argued by Holmes Cummins for appellant, and laid over for further argument.

And afterwards, to wit, at a court of appeals continued and held for the Commonwealth of Kentucky, at the capital, in the city of Frankfort, on the 5th day of October, 1883:

Order C't Ap'ls.

This day this cause came on for hearing and was argued by Attorney General Hardin for appellee, and laid over for further argument.

And afterwards, to wit, at a court of appeals continued and held for the Commonwealth of Kentucky, at the capital, in the city of Frankfort, on the 6th day of October, 1883:

26 *Order C't Ap'ls.*

This day this cause came on to be heard and was argued further by Attorney General Hardin for appellee, and laid over for further argument.

And afterwards, to wit, at a court of appeals continued and held for the Commonwealth of Kentucky, at the capital, in the city of Frankfort, on the 8th day of October, 1883:

Order C't Ap'ls.

This cause came on to be heard and was argued by Wm. Lindsey for appellant, and was submitted to the court.

And afterwards, to wit, at a court of appeals continued and held for the Commonwealth of Kentucky, at the capital, in the city of Frankfort, on the 18th day of December, 1883:

Judgment C't App'ls Affirming C't Below.

The court being sufficiently advised, it seems to them that there is no error in the judgment herein.

It is considered that said judgment be affirmed, which is ordered to be certified to said court.

It is further considered that the appellee recover of the ap-
27 pellant its costs herein expended.

The opinion delivered by the court of appeals in this case is as follows, viz:

Opinion C't of Ap'ls.

"The Cincinnati, New Orleans and Texas Pacific, the Chesapeake, Ohio, and Southwestern, and the Louisville and Nashville Railway Companies are in this court, as appellants, complaining of a judgment rendered by the Franklin circuit court against them in favor of the State for taxes alleged to be due and unpaid for the year 1882. The proceediing is by an ordinary action, authorized by the provisions of the act of April, 1878, entitled "An act to prescribe the mode of ascertaining the value of the property of railroad companies for taxation and for taxing the same." The appellants in their answer below insist that the mode of assessment or valuation

of railroad property for taxation, as prescribed by the State, is in direct conflict with the Constitution of the United States and the constitution of this State, and, therefore, the proceedings below should have been dismissed.

28 In order to a correct understanding of the issue made between the State and the appellants it is proper to notice the several legislative enactments under which the taxation in this case was imposed, and to review briefly the past legislation of the State with reference to the manner of assessing the property of such corporations.

By the provisions of the first section of the act of Apr. 3rd, 1878, the president or chief officer of each railroad company is required, in the month of July in each year, to return to the auditor of public accounts, under oath, the total length of such railroad, &c., with the average value per mile thereof, for the purpose of being operated as a carrier of freight and passengers, including engines, cars, and a list of the depot grounds and the improvements and other real estate of the company, and of the value thereof. By the third section the Governor is required to appoint three disinterested free-

29 holders, citizens of the State, who shall constitute a board of equalization, who shall meet annually at the office of the auditor in Frankfort on the first day of September in each year, a majority present constituting a quorum for the transaction of business, and at said meeting the auditor shall lay before them the returns made to him under this act, and should the valuations or any of them in the judgment of the board be either too high or too low, they shall correct and equalize the same by a proper increase or decrease thereof. It is further provided that their services shall not be for a longer period of time than twenty days in any one year. By section four "the same rate of taxation for State purposes which is or may be in any one year levied on other real estate in the Commonwealth shall be, and is hereby, levied upon the value so found by the said board of the railroad, rolling stock, and real estate of each company.

When the valuations are complete notice is given by the

30 auditor to each railroad company of the amount of its assessment for taxation for State purposes, &c., and the taxes are required to be paid on or before the 10th day of October in each year, and upon default made the taxes in behalf of the Commonwealth may be recovered by action in the Franklin circuit court.

The act of April 3rd, 1878, was amended by an act approved April 19th, 1882, by which the board of railroad commissioners appointed under the provisions of an act approved Apr. 6th, 1882, were required "to perform all powers and duties conferred upon the board of equalization by the act to which this is an amendment." This last enactment substituted the railroad commissioners as the board in room of the freeholders to be appointed by the Governor, whose duty it was by the act of Apr. 3rd, 1878, when the valuations placed on railroad property were too high or too low to correct and equalize the same by a proper increase or

31 decrease thereof.

The act creating the board of railroad commissioners is entitled "An act to prevent extortion and discrimination in the transportation of freight and passengers by railroad corporations, and in aid of that purpose to establish a board of railroad commissioners, and define its powers and duties." The purpose of that act seems to have been to invest the board with a supervisory power over railroad companies, so as to regulate and prevent improper charges for carrying freight and passengers, and to subject such companies upon information made to certain penalties when guilty of extortion.

The provisions of the 19th section of this act would conduce to the conclusion that the Legislature intended to confer upon the board judicial power in authorizing them to hear complaints, and render judgments in cases when railroad companies have violated the provisions of the first and second sections of the enact-
32 ment, but a careful consideration of the act will show an intention to give to the circuit court exclusive jurisdiction to enforce the fines and penalties imposed, and no other jurisdiction is conferred. The award of the board of commissioners, if such power is given by the nineteenth section, is but the basis of a prosecution to be instituted in a tribunal having jurisdiction of the subject-matter.

The commissioners under the act in question constitute a mere advisory board, without any power except to receive reports from railroad companies in the manner prescribed by the act, and to hear complaints and give information when, in their opinion, the railroad companies or any of them have violated the law. They may suggest the mischief, but are powerless to afford a remedy except by information to some other tribunal. If the power to render an award should exist, we perceive no reason why
33 under the enactment they could not assess the property of the corporations and exercise such ministerial duties as is required of them by the acts of Apr. 3rd, 1878, and its amendments, and the act of Apr. 6th, 1882.

The act of valuation is in its character judicial, but the general duties of this board is ministerial, and for the exercise of such duties the board was organized; and while the law creating it is in many respects imperfect, the court may disregard the nineteenth section of the act of April 6th, 1882, leaving the board to discharge all the other duties imposed by the act, and thus obviate the objection made by counsel that the act of April 6th, 1882, is in violation of section 2 of article one of the State constitution, providing that "No person or collection of persons belonging to one of these departments (legislative, executive, and judicial) shall exercise any power properly belonging to either of the others, except
34 in the instance hereinafter expressly permitted."

The appellants in this case, in the year 1882, made returns to the auditor, as required by the provisions of the act of April 3rd, 1878, stating under oath what they regarded as a fair valuation of their roads for the purpose of taxation. The board of commissioners, as is alleged, increased this valuation, and for that reason appellants

declined to pay the taxes imposed, and for these taxes the judgment below was obtained.

Two of the appellants paid to the auditor the amount of the taxes due upon the valuations as fixed by the chief officer of each corporation, but the Cincinnati, New Orleans and Pacific Railway Company declined to make any payment, in order, as they now state, that it might be heard upon the constitutional questions involved.

It is alleged in the petition by the State that the appellants were present and heard by the board of commissioners upon the question of valuation; nor do we understand that appellants are com-
35 plaining so much of the valuation placed upon their respective roads as of what they designate the arbitrary power conferred upon the board by the act in question. They maintain that, under the enactment, the hearing before the commissioners was a matter of favor only, and not of right, and that this case should be considered as if the valuation had been increased or fixed by the board without the presence of any of the officers of the corporation, and without express notice of the purpose of the board to increase the value of the railroad property, and in this light it is perhaps proper to consider the question that the rights of these parties may be finally determined.

It is maintained by the appellant that the Legislature of the State has no power to provide any mode for taxing railroads which will deprive them of the same remedies that other tax-payers have against arbitrary assessments, or which will make the prop-
36 erty of such corporations contribute more than their just and equitable share of the burden of taxation. Before proceeding to the consideration of the principal question involved it will be necessary to notice the present mode of assessment, with the remedies afforded the citizen for decreasing the valuation of his property when the estimate placed upon it by the assessor exceeds its value. The right of the citizen to a hearing when his property has been assessed for the purposes of State revenue has been seldom embodied in our system of taxation, and for the greater period of time during the existence of the State government there was no remedy afforded but that of legislative interference, when the only ground of complaint was that his property had been assessed for more than its value. From the year 1873 to the year 1878 no appeal was allowed from the action of the assessor to any tribunals for the purpose of hear-
37 ing such complaints, and we are not aware of any question made as to the constitutionality of such a revenue law. The doctrine, "that the mode of levying, as well as the right of imposing, taxes is completely and exclusively within the power of the Legislature," has always been adhered to by the courts of this State for the palpable reason, as stated by Mr. Justice Cooley in his work on "Constitutional Limitations:" There is no reason for the supposition that, in a matter of this public importance, where promptitude in collection is always desirable and often imperative, dilatory proceedings of this nature (through the forms of process and a jury trial) were within the contemplation of the people when consenting to any general provision of the Constitution.

The very existence of the government depends upon this sum-ary mode of collecting its revenue, and the delay occasioned by
38 appeals to the judicial tribunals of the State upon the mere questions as to the value of the property, while it might, in some instances, relieve the citizen, would conduce to distroy the government by taking from it that attribute of sovereignty, without which it cannot exist. As said by the Supreme Court, in the case of Providence Bank *vs.* Billings, reported in 4 Peters: "The interest, wisdom, and justice of the representative body and its relations with its constituents furnish the only security, when there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally." And in the case of St. Louis *vs.* The Ferry Company, 11 Wallace, the same Court said: "It has been said that the power of taxation for the purposes of the Commonwealth is a part of all-governmental sovereignty, and is inseparable from it. It is for the Legislature to decide what persons and property shall be reached by the exercise of this function, and in what proportion and by what process and instrumentalities taxes shall be as-
39 sessed and collected."

In the case of a State tax imposed on bonds held outside of the State, reported in 15 Wallace, it is further said: "Unless restrained by the opinions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited when the subjects to which it applies are within her jurisdiction." And in the case of Kirtland *vs.* Hotchkiss, in 10 Otto, the same general principle is again recognized. The abuse of this power by the State was never held as sufficient as to warrant interference by the Federal judiciary.

While this power as to the mode and amount of taxation is to be exercised alone by the Legislature, "and no attribute of sovereignty is more pervading," the legislative department of the Government is not clothed with the power of confiscating the property of the citizen under the guise of taxation. Certain elements, says Mr. Justice Cooley, are essential in all taxation. "It does not necessarily
40 follow because the power is so vast that everything which may be done under pretense of its exercise will leave the citizen without redress, even (if) there be no conflict with any express constitutional inhibition." "Absolute arbitrary power over the liberty and property of the citizen exists nowhere in a republic, not even in the largest majority." Bill of rights, section two.

The Legislature has no such power as to discriminate between the citizen- by makeing one or more assume the entire burden of taxation and exempt the others. Approximate equality in distributing the burden and uniformity in the mode of assessment is the cardinal rule, and as said by this court, in the case of the City of Lexington *vs.* McQuillan's Heirs, "that while taxation may not be universal, it must be general and uniform." Equality such as is practicable is essential to the constitutionality of taxation, and the only ex-
41 ception is found in cases of local taxation, when the special benefits authorize the imposition of the burden upon those who derive the benefits. From the case of The City of Lexington

vs. McQuillan's Heirs (ninth Dana), decided in the year 1840, and the intermediate cases, including the case of Preston *vs.* Roberts, decided at the January term, 1877, this court has held the rule as to uniformity and equality to be fundamental, and gone as far perhaps as the courts of any States in the Union in protecting the citizen against oppression and arbitrary taxation. "That there shall be equality as far as is reasonably practicable in the distribution of public burdens, whether local or general, is a cardinal principle in the law of taxation, and flagrant departure from that rule ought not to be allowed unless a more equal distribution under the circumstances is unattainable." (Preston *vs.* Roberts, 12 Bush.) Whether this cardinal rule has been violated we shall now proceed to inquire.

42 Under the general law for assessing property, real and personal, in this State for taxation the owner is required to list it under oath with the assessor, and after this has been done the assessor, upon his own knowledge and other evidence, fixes a full and fair valuation upon the property. (See sections 11, 13, & 16 of article 5, chapter 92, General Statutes.) By article sixth of the same chapter a board of supervisors, consisting of three tax-payers, citizens, is appointed by the county court, with the power to correct any errors committed by the assessor, whether in fact or in relation to the valuation of the property listed, and when the property has not been correctly valued to fix a proper value on the same. (Section 6 of article 6.) By an act approved April 2nd, 1868, this last act was so amended as to prevent the board from changing the value of the property as fixed by the assessor without giving notice to the owner,

43 to be served by an officer authorized by law to serve a summons. The party aggrieved may, if the board decides against him, appeal to the county judge, and if over fifty dollars may appeal from the decision of the county judge to the circuit court. The Legislature having seen proper to submit this question of valuation at the instance of the citizen to the courts of the State and not leaving it with the revisory board, being merely a question of policy, no necessity exists for enquiring into the expediency of the measure, as in either case after the property has been assessed the increase in valuation is not to be made without a hearing by the party whose rights are to be affected by the decission of the board.

These appellants, the railroad companies, say that the remedy afforded the citizen under the general law is not only withheld from them, but they are denied the right to a hearing before the tribunal,

44 board of commissioners, whose judgment becomes final as to the question of valuation. The board of railroad commissioners are required to meet an-ually, at the office of the auditor, in Frankfort, on the first day of September in each year, for the purpose of correcting and equalizing the value of the property of these corporations, and the same rate of taxation for State purposes which is or may be in any year levied on other real estate in this Commonwealth shall be levied on the value so found by the board. A railroad must necessarily be regarded as a unit, and, as this court has determined by reason of legislative authority, must

be taxed as such. Its rolling stock cannot be seized and subjected for taxes as seized for municipal purposes, nor are the railroads listed by the assessors of the counties through which they may pass for taxation. All of the locomotives, cars, etc., are treated as fixtures, and there is no better or more practical mode of assessing such property than to treat the whole as real estate. The
45 principal object of the Legislature in having the board of commissioners to assess and supervise the taxing of such companies was that no injustice might be done the companies by subjecting their property to fragmentary assessments, subject to the revision of the supervising boards of each county through which the roads might run.

Fragmentary taxation of the same line of road by a dozen or more dif-erent assessors would scarcely produce that uniformity in assessments so absolutely essential to produce equality in taxation; and the legislative purpose was to obviate such an objection and have a uniform assessment of this class of property, and no wiser suggestion could have been well made than to place the valuation in the hands of a board of intelligent freeholders, to be selected by the Executive of the State, thus removing the question of value from local influences and prejudices that often result in imposing upon such corporations oppressive burdens. These corporations should contribute their just proportion of the public burden and no
46 more. They have not been taxed on their property in a greater sum than any other owner of real estate, and when enjoying greater rights and privileges in the use of their property than ordinarily pertains to the individual owner of real estate, they should not complain of the mode of assessment that must in its results produce equality in the distribution of the tax.

While these companies may not have the right to appear before the county board of each county, they have had the valuation of their property fixed by the railroad commissioners and are not even complaining now that the valuation was too high. The classification of property in this State for the purposes of taxation has been the subject of much legislation. Corporations, such as banks, insurance companies, express companies, and railroad companies, have been required to list or have their property assessed in a different mode than that prescribed by the general law. Specific taxation is the rule with reference to corporations of one class and a mode
47 different from the general law designated in determining the value of other corporate property. The constitutionality of such legislation is now being questioned. When no discrimination is made to appear and no greater burden imposed on the property of appellants than upon other property of the State, whether belonging to individuals or corporations, when the citizen is permitted to leave the board of supervisors and go, by an appeal, to the circuit court to have his tax decreased, then arises a much more serious constitutional question than is presented in this case. The imposition of taxes is not a judicial function, still, under the statute of this State, the courts of the State are required to *been* complaints as to the valuation of property by the revisory board and to fix the

value of the property to be taxed or direct the board from which the appeal emanates to enter the opinion of the court as to the amount for which the citizen should be taxed.

The chancellor and common law judge should hesitate
48 before converting themselves into tax gatherers or assessors, although the ascertainment of value may be in the nature of a judicial finding. It is only a question with the Legislature whether the property of such corporations shall be assessed by the railroad commissioners, whose judgment shall be final, or subject their property to assessment by the county assessors, subject to revision by the county supervisors or the county judge. This question has in effect been decided by the Supreme Court of the United States, in an appeal from the supreme court of Illinois, in an opinion rendered by Mr. Justice Miller in what is known as the "State Railroad Tax Cases," reported in 2 Otto. It was alleged in one of those cases that the value of the railroad track, as returned by the chief officer of the company to the county clerk and auditor, was $648,436.41, and that the State board of equalization had assessed the value of the railroad track at $1,629,556. That the ag-regate value
49 of the rolling-stock as returned to the auditor was $338,039, and the aggregate value as fixed by the board of equalization was $1,000,110. It was further alleged that the assessments had been made without notice to the railway company.

The law in regard to assessments of railroad property in the State of Illinois is very similar to that in existance in this State, the principal difference being that the movable property of such corporations is deemed personalty. The State, county, and city taxes are collected on the assessment made by the board of equalization. It has larger power than is confided to the board of railroad commissioners in this State. The tax-payer in the State of Illinois, as in this State, must have notice before his property is increased in its value by the town or county supervisors, while the valuation of the corporate property may be increased by the State board without actual notice. It is true the State board may increase the valuation of the property of any citizen in the same way, but this does not
50 deprive him of the right to notice when the county or township supervisors undertake to increase the value. This action of the county or town supervising board may, and doubtless —, control the action of the board of equalization. The citizen has the benefit of the action of the county boards, and corporations submit alone to the action of the State board, so there is but little, if any, difference in the questions involved in those cases and the one being considered. It is argued, however, that the constitution of the State of Illinois expressly confers upon the General Assembly the power "to tax persons or corporations owning or using franchises and privileges in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates." This provision of the Illinois constitution, although not found in the constitution of this State, is but the recognition of a power that exists with the Legislature in the absence of a constitu-
51 tional provision. It is not necessary, or even practical, that

the mode of assessing and taxing property shall be uniform, but all property or kinds of property must be taxed equally and at a uniform rate. The mode of assessing the property of a railroad cannot well be similar to the general mode of assessment; and if the mode adopted does not make corporate property contribute more than its just share of the burden, the proceeding is not open to constitutional objection on that ground. One county assessor would have the same right to assess that another would, when the road ran through the county of each, and therefore the necessity of resorting to some other instrumentality for the purpose of fixing the value. It is further maintained by counsel for the appellants that the denial of these companies of a right to be heard, or the absence of an express provision in the act requiring notice to be given of the proceedings of the board, renders the assessment void. This
52 identical question was decided in the tax cases referred to; when the board had increased the assessment or value fixed by the local board, or chief officer of the railroad company, in the absence of any notice required by the act, and upon the allegation that no notice had been given. We are aware that in those cases the appellants were seeking an injunction against the collection of the tax, and the difference existing between that class of cases and those where the State undertakes by an action in a court of law authorized by statute to enforce payment of the tax, a defense would be permitted to be made to the action at law that would not authorize the granting of an injunction by a court of equity. This rule cannot affect the constitutional question. It is urged that the assessment is in violation of the Federal Constitution, and if so, it was void, and should have been so held by the chancellor.
53 In response to that argument, Mr. Justice Miller, speaking for the court, said: "It is hard to believe that such a proposition can be seriously made, because if void as to railroad companies, it must be equally void as to every other owner of property in the State. If the corporation is entitled to notice, every individual is equally entitled to it. The board had its term of sitting fixed by law, its sessions are not secret. No obstructions exists to the appearance of any one before it to assert a right or redress a wrong." The appellants urge that notice is indispensable, and as said by the learned judge, if so, it must be void as to all. But it is said that the board of commissioners in this State have no supervisory power over any property but that of railroad property, and, therefore, the cases referred to have no application. This can make no difference: if actual notice is required before an assessment can be made or an opportunity to be heard after the assessment has been made, the
54 cases are identical so far as affects the constitutionality of th act. The opinion in the tax cases of the county of Santa Clara and others against various railroad companies, delivered by Mr. Justice Field in the ninth circuit, district of California, has been referred to in support of the position assumed by appellants. We do not understand that such a question was involved in the consideration of those cases. It was held in the opinion of those cases that until the adoption of the Fourteenth Amendment there was no re-

straint to be found in the Constitution of the United States against the exercise of the taxing power of the States, but that the first section of the Fourteenth Amendment, declaring that "No State shall make or enforce any law which should abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," prohibits the imposition of unequal burdens by the State, and, therefore, gives to the Federal judiciary jurisdiction over such questions. Whether or not this is a proper construction of the amendment is a question not before us, and in regard to which we express no opinion.

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Unjust discrimination in imposing taxation when irregularity is necessarily produced has never met the approval of this court, but, on the contrary, has always been held to be unconstitutional; but we are not prepared to say that the ordinary mode of assessing property is invalid for the want of actual notice to the owner. The assessment is made by the assessor on the oath of the owner and other evidence, and because the owner has no appeal or revisory board to revise the assessment affords no constitutional objection to the law. Section 12 of the bill of rights provides "that no one can be deprived of his life, liberty, or property unless by the judgment of his peers or the law of the land" are equivalent to due process of law and mean the right to be heard for the preservation and protection of life, liberty, and property; but it was never supposed that the provisions of the bill of rights applied to the exercise of sovereignty in imposing taxes for the preservation and maintenance of the government other than the right of the assessor to value the property upon the oath of the tax-payer and other evidence, as provided by the statute, and if dissatisfied with the valuation, the owner, in the absence of a provision giving him a further hearing, must look to the Legislature for relief, and not to the judicial tribunals of the State. Such has been the uniform construction of the State courts when the term due process of law or its equivalent is found in State constitutions, and attempted to be applied to questions affecting State taxation for revenue purposes. The burden of State taxation is made at last to rest upon the shoulders of those whose incomes, while they furnish a comfortable support, seldom result in adding to the capital invested. They make no complaint of the burden, but capital at war with taxation when it affects the income of the State imposes what is conceived to be too onerous a burden, is demanding an appeal either to the revising boards or the judicial tribunals of the State, resulting often in exemption from a just and proper taxation. The hands of the sovereign are tied and the State government on the verge of bankruptcy, while the propriety of the tax is being considered by State and local tribunals "with regard to the precise mode of exercising the taxing power of the Legislature, unless restricted by some constitutional provision, seems to be invested with entire discretion." (Hilliard on Taxation, page 3.) The Supreme Court of the United States, in the case of Kelly *vs.* Pittsburg, reported in 14 Otto, uses the following language: "The main argument of the plaintiff in error,

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the only one to which we can listen, is that the proceeding in regard to the taxes assessed on his land deprives him of his property without due process of law. It is not asserted that in the
58 method by which the value of his land was ascertained for the purpose of taxation was any departure from the usual mode of assessment. In these respects there is no charge that the method pursued is not due process of law. Taxes have not as a general rule in this country since its independence nor in England before that time been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people have established a different procedure, which, in regard to that matter, is and always has been due process of law. In High *vs.* Shoemaker, 22 California, the Court said: "Because universal practice had established at the time our Constitution was adopted that this provision (referring to due process of law) in the Constitution was not understood as appli-
59 cable to the proceedings by the State to obtain from citizens their proper contributions to the expenses of administering the Government."

Again, the tax cases reported in 2 Otto, the Court alluding to the Federal statute of 1867, prohibiting a suit in any court for the purpose of restraining the assessment or collection of any tax, says: "And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could in any case interfere with the process of collecting taxes on which the Government depends for its continued existence. It is a wise policy. It is founded on the simple philosophy derived from the experience of ages that the payment of taxes has to be enforced by sum-ary and stringent means against a reluctant and often adverse sentiment, and to do this successfully other instrumentalities and other modes of procedure are necessary than which belong to courts of justice."
60 The mode of assessing and collecting taxes is not in the nature of a judicial proceeding. It is not a judicial inquiry when parties must have notice and the right to be heard.

Revisory boards may be established and appeals allowed by the legislative department of the State, but such modes of relief arise from questions of expediency, but cannot be demanded as a constitutional right. When an assessment has been made in the manner prescribed by the statute, and tribunals are organized with a view of disturbing that assessment by increasing the value of the property taxed, the party affected by it ought to have an opportunity to be heard, and it is in this class of cases where it is asserted that constitutional right to be heard cannot be denied. But even in a revisory board, with full power to revise the acts of the assessor, it would be impracticable to give such notice as is usual in
61 judicial proceedings before the board can take action. The time and place of meeting having been fixed by law is notice to all, and if the reports of the chief officers of these corporations are to be regarded as an assessment, and the commissioners, as a board of review, the act provides that they shall assemble at the auditor's office in Frankfort, on the first day of September in each year, for

the purpose of fixing valuations, and, with that view, are required to examine the reports made by the officers of the road. This is notice to the companies, and to require actual notice to every one interested, if this board had supervisory power over all property in the State, it would be altogether impracticable; nor will it answer to say that, because there are only a few lines of railroad within the State, actual notice could be readily given, for the court would then be determining the constitutionality of the act by the extent of this supervisory power. As we construe this act, although in the
62 nature of an original assessment, the parties had the right to be heard, and were in fact heard, before the board passing on the question of valuation. If actual notice is necessary, and the right to be heard expressly provided for by statute in such cases, then it is immaterial what may have been embodied in the constitution of the State of Illinois. Those cases fall within the prohibition of the Fourteenth Amendment, if the views of counsel prevails as to its construction. The opinion in the tax cases from that State covers the entire ground, and we are not only disposed to follow it, because it disposes of the constitutional question, but for the reason that it recognizes and establishes sound and conservative doctrine with reference to State taxation. It is further argued that, as a boardof commissioners, — have no power to increase the value of such property, and that their duty on this point is confined to the equalization of the valuation as reported by the various companies.
63 We do not so understand the enactment, but, in our opinion, the prime object was to fix the true value and increase each valuation, or the aggregate value, if in the opinion of the board the value was too low. It is, in fact, an assessing board, and the value fixed by the commissioners must stand. We find no discrimination made against the corporation in favor of the citizen. The same taxes are paid upon the same values and kinds of property, and we perceive no reason for disturbing the judgment below. The same is now affirmed in each case.

STATE OF KENTUCKY, *set:*

I, Thomas J. Henry, clerk of the court of appeals for the Commonwealth of Kentucky, do certify that the foregoing and
64 annexed 59 pages contain a true and complete transcript of the record therein set forth of The Chesapeake, Ohio and Southwestern Railroad Company, appellants, against The Commonwealth of Kentucky, appellee, as on file in my office.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said court, at my office at the capitol, in the city of Frankfort, this 5th day of January, 1884.

[Seal of Kentucky Court of Appeals.]

THOMAS J. HENRY, *C. C. A.*,
By THOMAS G. POORE, *D. C.*

Fee for this transcript	$17 70
Certificate	30
Seal	1 00
	$19 00

65 Supreme Court of the United States.

COMMONWEALTH OF KENTUCKY
versus
THE CHESAPEAKE, OHIO & SOUTHWESTERN RAILROAD COMPANY.

Know all men by these presents that we, The Chesapeake, Ohio & Southwestern Railroad Company, John Echols, and W. R. Ray, are held and firmly bound unto the Commonwealth of Kentucky in the sum of sixty-four hundred and ninety-two dollars; for the payment of which, well and truly to be made, we bind ourselves, and each of us, jointly and severally, firmly by these presents.

The condition of this obligation is such, that the above-named, The Chesapeake, Ohio and Southwestern Railroad Company, hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the court of appeals of the Commonwealth of Kentucky: Now, therefore, if the above-named Chesapeake, Ohio and Southwestern Railroad Company shall prosecute its said writ of error to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation to be void; otherwise, to remain in full force and virtue.

CHESAPEAKE, OHIO & SOUTHWESTERN
RAILROAD COMPANY, [SEAL.]
By JOHN ECHOLS, *Vice-Pres't.* [SEAL.]

JOHN ECHOLS. [SEAL.]
W. R. RAY. [SEAL.]

I am worth the penalty of this bond in property unencumbered lying in State of Kentucky.

JOHN ECHOLS.

66 I am worth the penalty of this bond in property unencumbered in State of Kentucky, and I am a resident of this State, city of Louisville.

W. R. RAY.

This bond is approved Feb'y, 1st 1884.
THOMAS F. HARGIS,
Chief Justice of Kentucky.

67 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the court of appeals of the State of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between The Chesapeake, Ohio & Southwestern Railroad Company, appellant, and The Commonwealth of Kentucky, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity;

or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the
68 Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said appellant, as by its complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the thirteenth day of February, in the year of our Lord one thousand eight hundred and eighty-four.

[Seal of 6th Circuit Court, Ky. Dist., U. S. of America.]

JOSEPH C. FINWELL,
Clerk of the Circuit Court of the United States, Ky. Dist.

Allowed by—
THOMAS F. HARGIS,
Chief Justice of Court of Appeals of Kentucky.

69 United States of America to the Commonwealth of Kentucky, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 2nd Monday in October next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the Commonwealth of Kentucky, wherein The Chesapeake, Ohio and Southwestern Railroad Company is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice be done to the parties in that behalf.

Witness the Honorable Thos. F. Hargis, chief justice of the court of appeals of the Commonwealth of Kentucky, this 1st day of February, in the year of our Lord one thousand eight hundred and eighty-four.

THOS. F. HARGIS,
Chief Justice.

Citation accepted, and further notice waived and appearance of Commonwealth of Kentucky entered.

P. W. HARDIN,
Att'y Gen'l.
A. DUVALL,
Att'y for Defendant in Error.

70 *Certificate of Hon. Thos. F. Hargis, Chief Justice of the Court of Appeals of Kentucky.*

THE CHESAPEAKE, OHIO AND SOUTHWESTERN RAILROAD COMPANY
vs.
THE COMMONWEALTH OF KENTUCKY.

The Chesapeake, Ohio and Southwestern Railroad Company having prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment of the court of appeals of the Commonwealth of Kentucky, rendered Dec. 18th, 1883, affirming a judgment of the Franklin circuit court of the 1st day of March, 1883, adjudging that the Commonwealth of Kentucky recover of said Chesapeake, Ohio and Southwestern Railroad Company the sum of $6,483, with costs:

It is now hereby certified that in the record proceedings, and also in the rendition of the judgment of said court of appeals, there was drawn in question the validity of a statute of said Commonwealth of Kentucky, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such its validity.

Given under my hand as chief justice of the court of ap-
71 peals of the Commonwealth of Kentucky, this 1st day of February, A. D. 1884.

THOMAS F. HARGIS,
Chief Justice of Kentucky.

Endorsed on cover: Kentucky court of appeals. No. 499. The Chesapeake, Ohio & Southwestern Railroad Company, plaintiff in error, *vs.* The Commonwealth of Kentucky. Filed 18th February, 1884.

115-321

Supreme Court of the United States.

OCTOBER TERM, 1885.

The Cin'ti, New Orleans and Texas Pacific R. R. Co.,
Plaintiff in Error.
vs.
The Commonwealth of Kentucky,
Defendant in Error.
No. 497.

The Louisville and Nashville R. R. Co.,
Plaintiff in Error.
vs.
The Commonwealth of Kentucky,
Defendant in Error.
No. 498.

The Chesapeake, Ohio and South-western R. R. Co.,
Plaintiff in Error.
vs.
The Commonwealth of Kentucky,
Defendant in Error.
No. 499.

In Error to the Court of Appeals of the Commonwealth of Kentucky.

BRIEF FOR PLAINTIFFS IN ERROR.

WM. LINDSAY,
For Louisville and Nashville R. R. Co.
HOLMES CUMMINS,
For C., O. and South-western R. R. Co.
C. B. SIMRALL,
For Cin'ti, N. O., and T. P. R. R. Co.

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CITATION OF AUTHORITIES.

SUPREME COURT OF THE UNITED STATES.

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1. THE LOUISVILLE & NASHVILLE RAILROAD CO., PLAINTIFF IN ERROR,
vs.
THE COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

2. THE CIN., NEW ORLEANS & TEXAS PACIFIC R. R. CO., PLAINTIFF IN ERROR,
vs.
THE COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

3. THE CHESAPEAKE OHIO & SOUTHWESTERN R. R. CO., PLAINTIFF IN ERROR,
vs.
THE COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

Brief for Plaintiffs in Error.

In Error to the Court of Appeals of the Commonwealth of Kentucky.

The foregoing three separate causes involve the same questions, and may well be heard and briefed together, and with the permission of this Court will be so heard and briefed.

STATEMENT.

The questions of constitutional law upon which the plaintiffs in error insist the three judgments of the Kentucky Court of Appeals should be reversed, arise out of the following acts of the Kentucky Legislature:

"An act to prescribe the mode of ascertaining the value of the property of railroad companies for taxation, and for taxing the same." Approved April 3, 1878. (*Bullitt & Feland's General Statutes*, 1883, *page* 1019.)

"An act to prevent extortion and discrimination in the transportation of freight and passengers by railroad corporations, and in aid of that purpose to establish a Board of

Railroad Commissioners, and define its powers and duties." Approved April 6, 1882. (*General Laws, Session Acts* 1882, *vol.* 1, *page* 66.)

"An act to amend an act, entitled 'An act to prescribe the mode of ascertaining the value of property of railroad companies for taxation, and for taxing the same,' approved April 3, 1878." Approved April 19, 1882. (*General Laws, Session Acts* 1882, *vol.* 1, *page* 99.)

The act of April 3, 1878, provides as follows:

Section 1. "That the president or chief officer of each railroad company or other corporation owning a railroad lying in this State, shall, in the month of July in each year, return to the Auditor of Public Accounts of the State, under oath, the total length of such railroad, including the length thereof beyond the limits of this State, and in each county, city, and incorporate town therein, together with the average value per mile thereof, for the purpose of being operated as a carrier of freight and passengers, including engines and cars, and a list of the depot grounds and improvements, and other real estate of the said company, and the value thereof, and the respective counties, cities, and incorporated towns in which the same are located. That if any of said railroad companies owns or operates a railroad or railroads out of this State, but in connection with its road in this State, the president or chief officer of such company shall only be required to return such proportion of the entire value of all its rolling stock as the number of miles of its railroad in this State bears to the whole number of miles operated by said company in and out of this State."

Section 2 relates to railroads in the hands of receivers or other persons under orders of Court, &c., and has no relevancy to the questions here raised.

Section 3 provides for the appointment of a Board of Equalization—

"Who shall meet annually at the office of the Auditor, in Frankfort, on the first day of September in each year, a majority present constituting a quorum for the transaction of business; and at the said meetings the Auditor shall lay before them the returns made to him under this act, and any schedules and valuations he may have made under the second section hereof; and should the valuations, or any of

them, in the judgment of said board, be either too high or too low, they shall correct and equalize the same by a proper increase or decrease thereof. Said board shall keep a record of their proceedings, to be signed by each member present at any meeting; and the said board is hereby authorized to examine the books and property of any railroad company to ascertain the value of its property, or to have them examined by any suitable disinterested person, to be appointed by them for that purpose." * * *

Section 4. "The same rate of taxation for State purposes, which is or may be, in any year, levied on other real estate in this Commonwealth, shall be, and is hereby, levied upon the value so found by the said board of the railroad, rolling-stock, and real estate of each company, and the same rate of taxation for the purposes of each county, city, town, or precinct, in which any portion of any railroad is or may be, in any year, levied on other real estate therein, and of the number of miles of such road therein, reckoned as of the value of the average value of each mile of such railroad, with its rolling stock, as ascertained as aforesaid."

The remainder of the section relates to county taxation, and need not be quoted.

Section 5 provides that "all taxes levied under the provisions of this act shall be paid on or before the 10th day of October in each year; and for a failure to pay the same, the officers of the said companies shall be subject to the same penalties to which they are now subject for a failure to pay the taxes now levied by law. And the taxes in behalf of the Commonwealth may be recovered by action in the Franklin Circuit Court, and those in behalf of the counties by actions in the Courts of civil common law jurisdiction in such counties respectively."

The act of April 6, 1882, provided, among other things, for the appointment of a "Board of Railroad Commissioners." The act of April 19, 1882, required that this Board of Railroad Commissioners should "perform all the powers and duties conferred upon the Board of Equalization" by the act of April 3, 1878.

Pursuant to section one of the last named act, and prior to the month of July, 1882, the chief officer of each of the corporations here complaining, reported to the Auditor the facts and valuations touching their several railroads and

other property required by such section. The aggregate of the valuations reported as to the railroads and the property of the Louisville & Nashville Railroad Company, was $12,152,078. The Board increased the aggregate valuation in the sum of $3,369,328.

The aggregate valuation reported for the Chesapeake, Ohio & Southwestern Railroad Company, was practically doubled by the Board of Equalization.

The aggregate valuation of the property of the Cincinnati, New Orleans & Texas Pacific Railroad Company was also greatly increased.

The first two companies paid to the Auditor the full amount of taxes due from them respectively upon the valuations reported by their principal officers. The last named company forbore to pay anything, in order that the questions touching the validity of the acts creating the Board of Equalization, and empowering it to increase at will the reported valuations of its property, might be raised without being in any way affected or prejudiced by a possible estoppel or recognition arising out of the fact of payment. It was ready to pay upon the valuations made by its principal officer, and we take the liberty to say has paid every cent due from it upon that basis.

These actions at law were instituted by the Commonwealth against the three railroad companies to recover the balances claimed to be due from them respectively in the way of taxes.

Demurrers were sustained to the answer of each company, and judgment rendered against each for the sum demanded.

The facts material to the present discussion appear from the petition and answer in each case.

As to the Louisville & Nashville Railroad Company, it was alleged that the proper report was duly made to the Auditor of Public Accounts. That the Board of Equalization was regularly organized on the 1st of September, 1882,

and that "the Auditor placed before them the valuations returns, and reports made to him by defendant," and—

"Plaintiff states that said board continued its sittings from day to day, as provided by law, of which defendant had due notice, and plaintiff avers that defendant did appear before said Board by its agents and attorneys, and presented such facts and figures, information and argument, in relation to the valuation and assessment of its said property as it saw proper."

The fact of the increased valuation, demand, and the failure to pay in full, was then set out, and judgment demanded.

The Railroad Company did not deny notice of the fact that the Board was in session, but averred that it had no authority to give notice, and was under no obligations to hear argument, or to consider any facts, figures, or information that might have been presented to it, and hence, for that and other reasons, the several acts under and in virtue of which it assumed to act, were each and all repugnant to and in conflict with the Constitution of the United States and the Constitution of Kentucky, and its valuations and returns of no legal validity or force. The facts developed by the pleadings in the other two cases are substantially in accord with the statement above.

ERRORS ASSIGNED.

We claim that the Court of Appeals erred in sustaining the validity of the act of 1878, and the act of April 19, 1882, because they are each and both repugnant to the Constitution of the United States, in the fact that they attempt to deny, and were intended to deny to companies and corporations owning railroads lying in Kentucky the equal protection of laws, and to deprive them of their property without due process of law.

MODES OF ASSESSING AND VALUING PROPERTY FOR TAXATION IN KENTUCKY.

As to all other property than railroads and their attachments, the general laws provide for assessment and valuation for taxation as follows:

Sections 12, 13, 14, and 15, of article 5, chapter 92, General Statutes, regulate the duty of the assessor and tax-payer, when they are brought face to face, in and about the ascertainment of the list of property to be given in for taxation. Then section 16 provides that—

"The assessor shall, from his own knowledge, and from the statements of the person listing property for taxation, and such other evidence as he may be able to obtain upon oath of witnesses sworn by him, fix a full and fair value upon all the estate listed with him for taxation, which is taxed according to its value, and enter the same, with the value thereof, in the order and manner prescribed, giving also the aggregate value."

The assessor can take no list and make no valuation without the personal presence of the tax-payer. He must seek him at his place of residence, and failing to find him, leave there a written notice requiring him to appear at a fixed time and place, and give in his list of taxable property, and still failing, the assessor shall return him delinquent. (*Sec.* 6, *art.* 5, *chapter* 92, *General Statutes.*) Delinquents are then to be summoned to appear in the County Court, where they may be punished, if willfully guilty, or permitted to list with the clerk of the Court, if not willfully in default. (*Sec.* 22, *Ib.*)

After the assessor has made his return, the valuations as made by him are reviewed by a Board of Equalization. That Board is charged with the duty of examining the tax-book, swearing witnesses, and correcting errors of the assessor, "whether in fact or in relation to the valuation of the property listed; and in cases where they shall be of opinion that any of the property has not been correctly valued, to fix a proper value on the same." (*Art.* 6, *chap.* 92.)

Article 6 was amended by an act approved April 2, 1878, as follows:

"That section 6, article 6, chapter 92, General Statutes, be, and the same is hereby, amended by adding thereto the following words, to-wit: But said board shall not change or alter the valuation of property, real or personal, as fixed by the assessor, without giving notice to the owner (or to his recognized agent, if he have one in the county); * * and said notice shall be served before any witness is examined concerning the true value of said property. From the decision of said board concerning the true value of said property, the owner (or his recognized agent) may, on motion before the Judge of the County Court of said county, at its next regular term, have the question concerning the true value of said property tried by the said Judge; and when the amount of taxes computed or to be computed on said property exceeds fifty dollars, the owner (or his recognized agent) shall, on motion, be granted an appeal to the Circuit Court of the said county." (*Bullitt & Feland's General Statutes*, 1883, *page* 1016.)

It will thus be seen, that from the inception of the act of assessment by the assessor to the final act of valuation by the Board of Equalization (and even in cases of delinqency), the tax-payer is entitled to actual notice of every step taken which may by any possibility operate to his prejudice; and if finally dissatisfied upon the question of valuation, may by appeal reach the Circuit Court, and have the benefit of its judgment, rendered in a proceeding conducted according to the rules and practices of a judicial tribunal.

In striking opposition to all this are the steps provided by the act of 1878 for the final valuation of the property of railroad companies or corporations.

The reports of the president or chief officers of the companies are laid before the board—

"*And should the valuations, or any of them, in the judgment of said board, be either too high or too low, they shall correct and equalize the same by a proper increase or decrease thereof.*"

The act does not, even by implication, make it the duty of the board to examine the property, or to hear testimony, or to take any steps whatever to ascertain the value of the

property covered by the returns before them. They are *authorized* to examine the books and property of any Railroad Company to ascertain the value of its property, or to have them examined by any suitable disinterested person appointed by them for that purpose; but this is an authority which they may or not exercise, at their own election.

The tax-payer to be affected by their action has no right to demand that they shall examine either its property or its books, or the witnesses offered, nor to be heard in the way of explanation or argument, or to notice that the board dissents from, or is dissatisfied with, the valuations of its president or chief officer. When the Auditor shall lay before the Board the returns made to him, the members present may test the valuations by their unaided judgment, and change them at will, "should the valuations, or any of them, *in the judgment of said Board*, be either too high or too low"

The first and only notice the Railroad Company can receive of the fact that the valuations returned are not approved by the judgment of the board (unless by grace or favor), must come through the record of the proceedings thereof as reported back to the Auditor of Public Accounts.

The company is then without remedy; and if it be concluded by the *ex parte* action of the board, it is because it is not entitled to the equal protection of the laws, and may be deprived of some portion of its property without due process of law.

OPINION OF COURT OF APPEALS.

In reference to these objections, the Court of Appeals used this language:

"Revisory boards may be established and appeals allowed by the legislative department of the State; but such modes of relief arise from questions of expediency, but cannot be demanded as a constitutional right. When an assessment has been made in the manner prescribed by the statute, and tribunals are organized with a view of dis-

turbing that assessment by increasing the value of the property taxed, the party affected by it ought to have an opportunity to be heard; and it is in this class of cases where it is asserted that constitutional right to be heard cannot be denied. But even in a revisory board, with full power to revise the acts of the assessor, it would be impracticable to give such notice as is usual in judicial proceedings, before the board can take action. The time and place of meeting having been fixed by law, is notice to all; and if the reports of the chief officers of these corporations are to be regarded as an assessment, and the commissioners as a board of review, the act provides that they shall assemble at the Auditor's office in Frankfort, on the first day of September in each year, for the purpose of fixing valuations; and with that view are required to examine the reports made by the officers of the road. This is notice to the companies; and to require actual notice to every one interested, if this Board had supervisory power over all property in the State, would be altogether impracticable; nor will it answer to say that, because there are only a few lines of railroad within the State, actual notice could be readily given, for the Court would then be determining the constitutionality of the act by the extent of this surpervisory power. As we construe the act, although in the nature of an original assessment, the parties had the right to be heard, and were, in fact, heard before the board passing on the question of valuation."

Criticising this extract, we have to say that the Legislature disagrees with the Court as to the practicability of giving such notice as is usual in judicial proceedings before the revisory can assume to change the valuations returned by the assessor. We have already seen that the act of April 2, 1878 (*Bullitt & Feland's Statutes*, 1016) provides that the Board shall not alter or change such valuations without giving notice. It designates the manner in which the notice shall be served, and declares that it *shall* be served "*before any witness is examined concerning the true value of said property.*" It is true the act defining the duties and powers of the Railroad Board of Equalization does fix the time when it shall assemble for business at the Auditor's Office at Frankfort, and this is notice to the company of the fact that the Board is in session for the purpose of

reviewing valuations, and changing them in accordance with the dictates of their judgment. But it is no notice to any company that the Board is dissatisfied with the valuations returned by its chief officer, or that it is proposed to increase those valuations.

The general law required the county boards of supervision to convene at the county clerk's office on the second Monday in May in each year, to examine and correct the assessor's book, and to review and adjust valuations (*Art.* 6, *chap.* 92, *General Statutes*.)

This was notice to all the tax-payers of the county that the Board was in session for the performance of all its duties, including the fixing of valuations. But the General Assembly, appreciating the fact that it was not notice to any particular tax-payer that it was proposed to change the valuation of his property, enacted the law of April 2, 1878, requiring such notice to be given, and prohibiting the Board from examining any witness concerning the true value of the property till the required notice should be served. This last named act, containing these express provisions as to notice was approved, as we have seen, on the 2d day of April, 1878, and the act providing for the valuation of railroad property on the day following, the 3d day of April, 1878.

The two acts relating to the same subject—the assessment and valuation of property for taxation—enacted by the same Legislature, considered at the same time, and approved almost simultaneously, index the understanding of the lawmakers, and evidence their intention so clearly that neither can be mistaken.

The Legislature must have understood that article 6 of chapter 92, General Statutes, gave no notice in point of fact to the tax-payer that the valuation of his property was about to be changed. Hence the amendment of April 2, 1878. This same Legislature must have understood that the act of April 3d, 1878, would give no notice in fact to

the railroad companies that the valuations returned by their chief officers were about to be changed by the Board of Equalization, and must have omitted from it the provisions incorporated into article 6, chapter 92, General Statutes, because it was intended that the one class of tax-payers should have this notice in fact, and the other should not; that the one class should have the right to appear and be heard, whilst the other should have no such right.

It will be observed the Court of Appeals does not intimate that the act of the 3d of April, 1878, entitled the railroad companies to such notice in fact as was secured to the general tax-payer by the act of April 2d. It decided only that the time and place of the meeting of the Board being fixed by law, such companies could have their representatives present during the twenty days it may remain in session; and if it should come to the knowledge of either of them that the valuations returned by the chief officer of his company were about to be increased, then such company might have the right to be heard.

When it is considered that the Board meets at the office of the Auditor for the single purpose of receiving the returns, schedules, and valuations in his hands; that its deliberations are not required to be open or public, or even to be continued at Frankfort, the worthless character of the supposed "right to be heard" will be appreciated, and the broad discrimination against the prescribed class of tax-payers seen and understood.

It may be proper to notice in this connection the suggestion of the Court of Appeals, that the work of the Board of Equalization is in the nature of an original assessment. If such be the case, the contrast between the methods of the original assessment of the property of tax-payers in general, and that of companies or corporations owning railroads and their attachments, is worthy of consideration. In the one case the assessor can take no step without the actual presence of the tax-payer, and the property of the

delinquent tax-payer cannot be assessed by order of the County Court till he has been regularly summoned to appear and has had opportunity to be heard. Further than this, up to the time tax-payers in general have actually paid their taxes, they may have their tax lists corrected, and improper charges eliminated therefrom by the County Courts of their respective counties. (*Sec.* 2, *art.* 7, *chap.* 92, *Gen. Stat.*)

Railroad companies and corporations are denied all these safeguards. The assessing board is not required to have their representatives present whilst the work of assessment is being performed. There is no supervising board to correct erroneous valuations There is no tribunal to which the Railroad Company can apply to have improper charges eliminated from the tax-list made up against it. If it fails through accident, or the grace of the board of assessment, to discover that the valuations returned to the Auditor by its chief officer are about to be changed to its prejudice, and thereupon to exercise its supposed "right to be heard," it finds itself bound, beyond the possibility of relief, by the star chamber action of a body which the act of 1878 declared should have the right to deal with the property of a class of tax-payers, subject to no rules of procedure, and limited in the scope of its action by nothing except its own judgment and discretion.

Therefore, whether the Board be treated as a board of supervisors, reviewing and correcting the returns of the *quasi* assessors, the chief officers of the several companies, or a board of assessment taking original action, the unjust and indefensible discriminations against the class of tax-payers here complaining, are equally clear and indisputable. And it is equally plain that the act of April 3d, 1878, was intended to deny to railroad companies and corporations the equal protection of the laws, and to deprive them of their property without due process of law.

Before proceeding to the discussion of the constitutional questions involved, we shall dispose of certain intimations thrown out by the Court of Appeals as collateral supports to the deliverances affirming the judgments of the Circuit Court. It is said by the Court of Appeals that the railroad companies do not complain that the valuation of their roads is too high, and the fact is repeatedly referred to that they pay no more upon the valuations of their property than is proportionately paid by other owners of real estate. A moment's reflection will show that the Railroad Companies could have no relief in these actions against unjust valuations and the consequent increase of the taxation imposed upon them. Legal assessments and valuations conclude the tax-payer, however unjust or oppressive they may be. There being no appeal from the action of the Board of Equalization, and the Courts having no jurisdiction to review or correct its valuations, the Railroad Companies were bound to defend, if at all, by attacking the validity of the act creating the Board, or by calling in question the constitutionality of the provisions attempting to confer upon it the extraordinary powers in virtue of which it assumed to act. This being true, no disadvantage can come to the plaintiffs in error because of their failure to raise an immaterial issue.

But since this subject was alluded to in the opinion, the attention of this Court is called to the valuations placed upon the main stems of the roads of the Louisville & Nashville and the Cincinnati, New Orleans & Texas Pacific Companies. Those valuations are from $30,000 to $35,000 per mile. The average valuation of the roads of the Louisville & Nashville Company, including branches and feeders, is over $22,000 per mile. In the San Mateo case the road of the Southern Pacific Company was valued at $16,500 per mile. This difference is enough to suggest the fact that the valuations are far too high, and that the taxes sued for are greatly out of proportion to the

exactions made upon the owners of other than railroad property.

The Court of Appeals put some stress upon the fact that the Commonwealth alleged, and the Railroad Companies failed to deny, that they were present, and heard by the Board of Commissioners upon the subject of valuation. Understanding that the constitutionality of a supposed law does not depend upon what has been done under it, but what may, by its authority, be done (*Stuart vs. Palmer*, 74 *New York*, 191), counsel treated the averment in question as immaterial, and properly declined to join issue upon it. But if it be conceded that, by the grace of the Board, the companies did appear before a tribunal assuming the right to exercise powers repugnant to the organic law of the land, and attempted there to avert an impending wrong, they did not by so doing estop themselves when sued, to call in question the constitutionality of the statute, in virtue of which that tribunal claimed authority to inflict the wrongs of which they here and now complain.

It was said by the Court of Appeals, in the course of its opinion, that the burden of State taxation is made to rest upon the shoulders of those whose incomes furnish a comfortable support, but seldom result in adding to the capital invested; that they make no complaint, but that "capital, at war with taxation," demands an appeal, either to revisory boards or judicial tribunals, and that "the hands of the sovereign are tied, and the State government on the verge of bankruptcy, while the propriety of the tax is being considered by State and local tribunals."

There is no support for this deplorable picture of the financial condition of Kentucky in either of these records; and it is a fact that the entire indebtedness of the State amounts to less than that of the average American city of one hundred thousand inhabitants, and its four per cent. bonds sell at a premium in every market on the continent. It is also true that railroad companies have not delayed, and

cannot delay, the collection of taxes by appeals to revisory boards and judicial tribunals. The doors of those boards and tribunals are closed to them, though standing open to all other tax-payers.

These companies are in Court in this litigation as defendants. They seek no affirmative relief. They have paid their full proportion of the tax levy for 1882, and ask only to be protected against the results of an arbitrary and unconstitutional legislative enactment.

These records bear out the assertion that the railroad companies have interposed no obstacles to the speediest disposition of these cases consistent with the rules of procedure prevailing in this and the State Courts.

POWER OF JUDICIARY TO PROTECT AGAINST UNEQUAL & UNCONSTITUTIONAL TAXATION.

It was insisted in argument in the State Courts that the judiciary should not interpose to defeat a tax levy made for the general purposes of a State government. It was conceded that the citizen might appeal to the Courts in cases of local taxation, and their power to protect him against unconstitutional methods and their results was not denied. But it was claimed that the power of taxation for general revenue purposes rests on a principle different from the power to impose local taxation for local purposes, and it was broadly asserted

"That no Court, until the decision of the California case by Judge Field, has ever declared any general revenue law unconstitutional for want of hearing or appeal, or 'due process of law,' or 'law of the land,' and have in no instance granted relief, except where tangible injury and damage has actually resulted from some violation of constitutional principle."

The proposition involved in the latter portion of this quotation ignores the fact that no step can be lawfully taken to enforce the collection of a tax, local or general, until there has been a lawful assessment; that it is the first step in the proceeding against individual subjects of taxation,

and the foundation of all that follow; that without it every other step is null and void. (*Blackwell on Tax Titles, sec.* 106; *Cooley on Taxation, page* 259, *and authorities cited.*)

It overlooks the Kentucky rule that the tax payer cannot be sued for non-payment of the taxes with which he is lawfully chargeable till they have first been assessed; and that until there has been a lawful assessment the State has no actionable demand against the tax-payer. (*L. & N. R. R. Co. vs. Commonwealth, 1st Bush*, 250.)

The first proposition quoted seems to imply the want of power in the judiciary to refuse relief to the State, when its declared cause of action is an alleged demand for taxes levied for general purposes, even though the statute under which the claim is being asserted may be successfully impeached as repugnant to and in conflict with the limitations of the Federal Constitution.

We will not consume time in combatting a position so extraordinary.

We concede without hesitation that the mode of levying, as well as the right of imposing taxes, is exclusively within the legislative power; that it is for that department to decide what persons and property shall be reached, and in what proportions, and by what process and instrumentalities taxes shall be assessed and collected. We concede the reluctance with which the Courts interfere with the exercise of a power so essential to the proper administration of government, and admit that mere impolicy, impropriety, or injustice cannot of themselves be made the foundation for their interposition.

"Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited where the subjects to which it applies are within her jurisdiction." (15 *Wallace*, 319.)

But the express prohibitions upon the States contained in the Federal Constitution—

"Apply equally to taxation and to every other action of the State. They cannot be evaded under the plea that the

State possesses the unrestricted power to tax. Where, for example, a State has stipulated, for a valid consideration, to exempt certain property from taxation, as it has been repeatedly held that she may do, the stipulation cannot subsequently be withdrawn, and the property subjected to taxation. The provision which secures the inviolability of contracts against State legislation stands as a perpetual interdict against the imposition of the charge. It is to no purpose in such a case to speak of the power of taxation as an attribute of State sovereignty which cannot be surrendered; that sovereignty, whatever its extent, must be exerted in subordination to the prohibition of the Constitution, which is the supreme law of the land. Many of the attributes of sovereignty, which the States would possess if independent political communities, have been in like manner surrendered to the Federal Government, such as the power to declare war, to make peace, to enter into treaties of alliance, and to regulate commerce with foreign nations. The question in all cases presented to a Federal Court, where complaint is made of a tax levied by the States, is whether there is any inhibition, express or implied, in the Constitution of the United States upon the imposition of the tax. If there be, it is the duty of the Court to enforce the inhibition. It matters not whom its decision may affect, nor how great and irresponsible the power of the State may be independently of such prohibition." (*Opinion of Justice Field in San Mateo Tax Cases.*)

This is but an exemplification of the rule in Kentucky. Speaking of the exercise of arbitrary power over the property of the citizen under the guise of taxation, the Court of Appeals, in *Howell vs. Bristol* (*8th Bush*, 499), said:

"No such power over the property of the citizen can be constitutionally exercised by any department of our State Government; and whenever it is attempted, it is the imperative duty of the judiciary to interpose in behalf of those whose constitutional rights are being prejudicially affected."

As far back as 1840, in the case of *Lexington vs. McQuillan's heirs* (9 *Dana*, 516, 517), this doctrine was declared by the same Court. After conceding the almost

unlimited power of the Legislature over the subject of taxation and the methods of its imposition, the Court said:

"The distinction between constitutional taxation and the taking of private property for public use by legislative will, may not be definable with perfect precision; but we are clearly of the opinion that, whenever the property of a citizen shall be taken from him by the sovereign will and appropriated without his consent to the benefit of the public, the exaction should not be considered a tax, unless similar contributions be made by that public itself, or shall be exacted rather by the same public will from such constituent members of the same community generally as own the same kind of property. * * * * * * * Although there may be a discrimination on the subject of taxation, still persons in the same class, and property of the same kind, must generally be subjected alike to the common burden. This alone is *taxation* according to our notion of constitutional taxation in Kentucky."

Throughout this admirable opinion, the power of the Courts to distinguish between constitutional taxation and legislative spoliation was consistently maintained, and there was no intimation that it was not equally their duty to protect against the latter and to support and maintain the former. The principle upon which State Courts enforce the limitations of the State constitutions in the imposition and collection of taxation for State purposes, authorizes and requires the Courts of the Federal Government in like manner to enforce the prohibitions of the Federal Constitution.

"Comprehensive as the power of the States is to levy and collect taxes and excises, it is nevertheless clear, in the judgment of this Court, that the power cannot be exercised to any extent in a manner forbidden by the Constitution." (*Ward vs. Maryland*, 12 *Wallace*, 430.)

STATE TAXATION IS EMBRACED BY THE THIRD CLAUSE OF THE FIRST SECTION OF THE FOURTEENTH ARTICLE OF AMENDMENT.

"The Fourteenth Amendment of the Constitution, in declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws, creates a

limitation upon the exercise of all the powers of the State which can touch the individual or his property, including among them that of taxation. Whatever the State may do, it cannot deprive any one within its jurisdiction of the equal protection of the laws; and by equal protection of the laws is meant equal security under them to every one on similar terms in his life, his liberty, his property, and the pursuit of happiness. It implies not only accessibility by him, on the same terms with others to the Courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also an exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances." (*Justice Field's San Mateo Opinion.*)

The foregoing is in harmony with cotemporaneous Congressional construction. The Civil Rights Bill of May 31st, 1870, and section 1977, Revised Statutes, declare that

"All persons within the jurisdiction of the United States " * * * * * * shall be subject to like punishments, "pains, penalties, taxes, licenses, and exactions of every "kind, and no other."

Illustrative of the general subordination of the States to the limitations of the Federal Constitution, in the exercise of their powers of taxation for the general purposes of government, is the decision of this Court in the recent Virginia coupon cases.

The coupons attached to the bonds, issued under the provisions of the Funding Act of 1871, stipulated that they should be

"Receivable at and after maturity for all taxes, debts, and demands due the State."

By an act passed and approved in 1882, it was provided

"That the several tax collectors of this Commonwealth shall receive, in discharge of the taxes, license taxes, and other dues, gold, silver, United States Treasury notes, National Bank currency, and nothing else."

In obedience to this latter enactment, the collecting officer refused to accept coupons, and the tax-payer de-

clining to pay in money, property was seized. The tax-payer sued in detinue. The officer attempted to justify by pleading obedience to the act of 1882. His defense was held insufficient. This Court said:

"He relied on the act of January 26, 1882, requiring him to collect taxes in gold, silver, United States Treasury notes, National Bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative enactment of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States, and its own contract, both irrepealable by any act on its part, are the law of Virginia; and the law made it the duty of the defendant to receive the coupons tendered, etc." (*Poindexter vs. Greenhow*, 114 *U. S.*, 270.)

The dissenting opinion prepared by Mr. Justice Bradley, and concurred in by the Chief Justice and Justices Miller and Gray, does not question the invalidity of the act of 1882. The dissent rests upon the ground that the suit against the collecting officer was, in effect, a proceeding "to coerce the State through its officers to compel a specific performance by the State of its agreement," and therefore forbidden by the Eleventh Amendment to the Federal Constitution. But in this dissent the right of a tax-payer to relief against unconstitutional legislation in regard to taxation is recognized in language as striking as unmistakable. It is said:

"But then it will be asked, 'Has the citizen no redress against the unconstitutional acts or laws of the State?' Certainly he has. There is no difficulty on the subject. Whenever his life, liberty, or property is threatened, assailed, or invaded by unconstitutional laws, he may defend himself in every proper way—by *habeas corpus;* by defense to prosecutions; by actions brought in his own behalf; by injunction; by mandamus. Any one of these modes of redress suitable to his case is open to him. A citizen cannot in any way be harmed, injured, or destroyed by unconstitutional laws without having some legal means of resistance

or redress. But this is where the State is moving against *him* The right to all these means of protection and redress against unconstitutional oppression and exaction is a very different thing from the right to coerce a State into the fulfillment of its contracts. The one is an indefeasible right, a right which cannot be taken away. The other is never a right, but may or may not be conceded by the State ; and, if conceded, may be conceded on such terms as the State chooses to impose" (114 *U. S. Reports*, 335, 336.)

There was no difference of opinion in the Court as to the right of the tax-payer to resist the enforcement of a State enactment upon the subject of general taxation forbidden by the Federal Constitution when moved against by the State.

In answer to the argument so much pressed in the State Courts, that State Governments cannot successfully perform their governmental functions if delayed in the collection of their revenues by judicial interference at the instance of the tax-payers, we quote further from the principal opinion in *Poindexter vs. Greenhow:*

"The fancied inconvenience of an interference with the collection of its taxes by the government of Virginia, by suits against its tax-collectors, vanishes at once upon the suggestion that such interference is not possible, except when that Government seeks to enforce the collection of its taxes contrary to the law and the contract of the State, and in violation of the Constitution of the United States." (114 *U. S., p.* 297.)

And upon the power of the Federal judiciary to enforce obedience to the mandates of the Federal Constitution in controversies affecting the general revenues of the States, we quote further:

"And it is no objection to the remedy in such cases that the statute whose application in the particular case is sought to be restrained is not void on its face, but is complained of only because its operation in the particular instance works a violation of a constitutional right; for the cases are numerous where the tax laws of a State, which, in their general and proper application, are perfectly valid, have been held to become void in particular cases, either as unconstitutional regulations of commerce, or as violations of contracts prohibited by the Constitution, or because in some other way

they operate to deprive the party complaining of a right secured to him by the Constitution of the United States."

This declaration effectually disposes of the contention that State taxation is not included in, or embraced by, the general language of the fourteenth article of amendment:

"Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It settles the law to be, that whenever a State, by any means, or for any purpose, or under any pretext, moves against any person to deprive him of any right secured to him by the Constitution of the United States, and he invokes the interposition of the Federal judiciary in the appropriate way, it is bound to afford him such protection as the nature of his particular case may require.

CORPORATIONS AND CORPORATE PROPERTY ARE WITHIN THE PROTECTION OF THE FOURTEENTH AMENDMENT.

"A general law concerning persons may include artificial as well as natural persons, and every corporation is a legal person. * * * * A private corporation, like a bank or railroad or turnpike company, is, in the technical sense, altogether personal." (*City of Louisville vs. Commonwealth*, 1 *Duvall*, 295.)

"Persons being either natural or artificial; 'person,' by legal interpretation, includes both classes; and a corporation being in this legal sense a person, the appellant is *prima facie* included in the word 'person' in the revenue law." (*L. & N. R. Co. vs. Commonwealth*, 1 *Bush*, 253.)

In jurisprudence a person is the object of rights and duties, *i. e.*, capable of having rights and liable to duties. (*Rapalje & Lawrence's Law Dictionary, vol.* 2, *p.* 954.)

In statutes affecting the rights and duties of property, the word "person" *prima facie* includes business corporations. (*Morawetz on Private Corporations, sec.* 457, *and authorities cited.*)

In fact as in law, a corporation is but an association of persons or individuals, who are the real owners of the corporate property, and when the corporation acts, or is acted upon, it is these individuals who are affected by the result.

"The necessities and conveniences of travel and business require that such numerous associates and stockholders should act by representatives, and have the faculty of contracting, suing and being sued, in a fictitious or collective name. But these important faculties, conferred on them by State legislation for their own convenience, cannot be wielded to deprive others of acknowledged rights. It is not reasonable that those who deal with such persons should be deprived of a valuable privilege by a syllogism, or rather sophism, which deals subtly with words and names without regard to the things or persons they are used to represent." (*Marshall vs. B. & O. R. Co.*, 16 *Howard*, 327.)

The converse of the foregoing proposition is equally true.

Whether a corporation be defined "an artificial being, invisible, intangible, and existing only in contemplation of law," or "a legal entity," or a "succession or collection of persons, having in the estimation of law an existence, and rights and duties distinct from those of the individual persons who form it from time to time," the fact remains that, to deprive a corporation of its property, is to deprive the shareholders of their respective proportionate interests in all that may be taken.

The rule of construction applied by this Court to the words "person" and "property," as used in the Federal Constitution, is aptly illustrated by the opinion of the Chief Justice, and the dissenting opinion of Mr. Justice Strong in the Sinking Fund cases

Said the Chief Justice:

"The United States cannot, any more than a State, interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition, which prevents States from passing laws impairing the obligations of contracts; but equally with the States, they are prohibited from depriving persons or corporations of property without due process of law." (99 *U. S Repts.*, 718)

In his dissenting opinion, Justice Strong treated it as a conceded fact, that the railroad corporation was within the definition of the word "person," as used in the Fifth Amendment. He said:

"The Fifth Amendment contains restrictions taken, in substance, from the Magna Charta. Among them are the provisions that no person shall be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use without just compensation. These are restrictions upon legislative as well as executive power." (99 *U. S., page* 737.)

The Fourteenth Amendment imposes upon the States like limitations and prohibitions as to the taking of private property, and the deprivation of life, liberty, and property, with those imposed upon the powers of the Federal Government by the Fifth Amendment.

The word "person" is used in the Fourteenth Amendment in like connection with its use in the Fifth; that is, in connection with the preservation of life, liberty, and property. The presumption, therefore, is well nigh conclusive, that it was intended to be used in the same sense in each instance, and that corporations, as well as natural persons, were intended to be protected by the Fourteenth Amendment against any arbitrary or irregular exercise of power by the States, to the same extent that the Fifth Amendment protects them against such exercise of power by the Federal Government.

The opinion of this Court in the Slaughter House cases, as explained by its opinion in the case of the *Butchers' Union Co.* (111 *U. S.*, 746), gives no ground whatever for the claim that the first clause of the Fourteenth Amendment was intended to operate for the protection of the negro race alone. That the moving cause of its adoption was the determination of the people of the several States to secure to the freedmen the equal protection of the laws throughout the length and breadth of the republic will not be called in question; but that the Congress that proposed, or the States that adopted it, intended or expected that the whites

should not equally with the blacks share in the benefits of its protecting limitations and inhibitions, we do most unequivocally deny.

To guard against a possible misapprehension of the language of the principal opinion in the Slaughter House cases, Mr. Justice Miller qualified it thus:

"We do not say that none else but the negro can share in this protection. Both the language and the spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the minds of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void; and so if other rights are assailed by the States, which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent."

Further than this, the discussion in the Slaughter House cases turned upon the rights, privileges, and immunities of citizens of the United States, and not, as here, upon the rights of persons, without regard to citizenship, to the equal protection of the laws in all matters affecting their lives, liberty, or property.

That all persons, black or white, are equally within the provisions of the latter clauses of the first section of the Fourteenth Amendment was treated as a proposition not open to question by this Court in the cases of *Davidson vs. New Orleans* (96 *U. S.*, 97); *Hentado vs. California* (110 *U. S.*, 516); *Hagar vs. Reclamation District* (111 *U. S.*, 701); *Foster vs. Kansas* (112 *U. S.*, 201); *Kennard vs. Louisiana* (92 *U. S.*, 480), *and Chicago Life Ins Co. vs Needles* (113 *U. S.*, 574)

In the last named case, it was a corporation that invoked the protection of the amendment; and whilst the Court held that there had been no denial of the equal protection of the laws, and no deprivation of property without due

process of law, it did not intimate that the complaining party could have had no relief if an opposite state of fact had been made to appear.

In considering the provisions of the Fourteenth Amendment, this Court has in every instance recognized the applicability of the doctrine that,

"The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making the exception;" and that to make the exception, the Court must be able "to say that, had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception." (*Dartmouth College Case.*)

Concluding this branch of the discussion, we submit that, under the Constitution, no State can deprive any person, white or black, or any business corporation or association, of his or its property without due process of law, or deny to any such person, corporation, or association, within its jurisdiction, the equal protection of the laws.

THE KENTUCKY STATUTES DENY TO RAILROAD CORPORATIONS THE EQUAL PROTECTION OF THE LAWS IN THE ASSESSMENT AND VALUATION OF THEIR PROPERTY FOR TAXATION.

We have seen that, by the general laws, the individual tax payer must be sought out by the assessor at his place of residence, and if not found, must be notified in writing, the time and place being fixed, to meet the assessor, and give in his list. Failing in this, he may be reported as a delinquent. (*Sec.* 6, *art.* 5, *chap.* 92, *Gen. Stat.*)

If reported as delinquent, the individual tax-payer must be brought into Court by regular summons, and if it shall be found he was not willfully in default, he may list his property with the County Court Clerk in the manner prescribed by law. (*Secs.* 22 *and* 23, *art.* 5.)

The officer, whether assessor or clerk, "shall, from his own knowledge, *and* from the statements of the person listing the property, and such other evidence as he may be able to obtain upon oath of witnesses sworn by him, fix a full and fair valuation upon all the estate listed with him for taxation." (*Section* 16, *article* 6, *chapter* 92.)

The tax-payer, if dissatisfied with the valuation thus made in his presence, may apply to the Board of Supervisors, and have the same corrected. (*Article* 6, *chapter* 92.)

If the individual tax-payer has been improperly charged with any tax, he may, before payment, make proof thereof, and have his list corrected. (*Section* 2, *article* 7, *chapter* 92.)

The Board of Supervisors cannot increase the valuation of the property of an individual tax-payer till he has been served with notice of the fact that the increase is proposed, and from the decision of the Board he may appeal to the County Court, and if the tax be as much as fifty dollars, to the Circuit Court for relief. (*Act April* 2, ~~1882.~~ 1878)

Corporations, other than railroad companies, are assessed thus. Turnpike companies paying dividends report to the Auditor, through their treasurers or presidents, and pay six per centum of their annual dividends as taxes.

Bridge, mining, street railway, manufacturing, gas, and water companies report, through certain of their respective officers, to the Auditor the total cash value of their property, and pay into the Treasury a tax upon each one hundred dollars of the value of the property owned, possessed, held, or represented, a sum equal to the tax collected upon real estate. (*Sections* 2, 3, 4, *and* 5, *article* 12, *chapter* 92.)

The reports and valuations required by sections 3 and 4, *supra*, are treated as complete and perfect assessments. They are not subject to revision by any Board or Court. They conclude the taxing officers and the State.

Not so with the reports made by the chief officers of Railroad Companies. Their schedules and valuations are the counterparts of those made out by the officers of the

toll-bridge, mining, manufacturing, gas, water, and street railway companies. Upon their faces they are complete and perfect assessments. But they are not conclusive. They are to be turned over to or laid before the Board of Equalization. The judgment of that Board as to the questions of value can be peremptorily substituted for the sworn and intelligent valuations returned by the officers selected by the statute, and the valuations made by the Board of Equalization are conclusive upon the tax-payer and the Courts.

As said in the Report of the Railroad Commissioners of Kentucky, 1881, page 129:

"*The law under which railroad property is taxed in this State, left the fixing of values to the discretion of the Commissioners, and from their decision there was no appeal.*"

The Court of Appeals agreed with the Commissioners that their action is final and conclusive.

In the course of its opinion it said:

"It is only a question with the Legislature whether the property of such corporation shall be assessed by the Rail-Road Commissioners, whose judgment shall be final, or subject their property to assessment by the county assessors, subject to revision by the county supervisors or the County Judge."

In other words, it is a matter of legislative discretion whether the great mass of the tax-payers shall have actual notice, and an actual opportunity to be heard before the original valuations of their property shall be increased, with the right to appeal—first, to the County Judge, and then to the Circuit Court for redress; and another and smaller class shall have no appeal from, and no means by which to have reviewed, the action of a Board not required by law to give notice of its intention to increase original valuations, and before which the aggrieved party can secure the right to be heard in no other way than by attending upon its sittings during the period of twenty days.

"The publication of the notice of the sittings of the Board amounts to no protection to the owner, for the sessions of the Board are, or may be, from the first Monday in August until the second Monday in September, and it could scarcely be expected that every tax-payer is to wait upon the Board to see if his taxes are to be increased." (*Patten vs. Green*, 13 *Cal.*, 325.)

"It is not enough that owners may, by chance, have notice, or that they may, as a matter of favor, have a hearing. The law must require notice, and give them a right to a hearing, and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has in fact been fairly apportioned. The constitutionality of law is to be tested, not by what has been done under it, but what may, by its authority, be done. The Legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice." (*Stuart vs. Palmer*, 74 *N. Y.*, 183.)

"I apprehend," says Mr. Justice ~~Milnes~~ Willes, "that a tribunal, which is by law invested with power to affect the property of one of her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds; and that the rule is of universal application, and founded upon the plainest principles of justice." (*Cooper vs. Board of Works*, 108 *Eng. C. L.*, 180.)

"The Legislature has no power to take away a man's property, nor can it authorize its agents to do so, without first providing for personal notice to be given to him, and for a full opportunity of time and place and tribunal to be heard in defense of his rights. This constitutional guaranty is not confined to judicial proceedings, but extends to every case in which a citizen may be deprived of life, liberty or property, whether the proceeding be judicial, administrative, or executive in its nature." (*Mulligan vs. Smith*, 59*th California*, 231–243.)

"It does not appear that the plaintiff had any opportunity of showing that the original valuation was correct. Under these circumstances, it seems to us that the act of the county commissioners in raising the valuation was without authority and void." (*Kan. P. R. Co. vs. Russell*, 8 *Kan.*, 558.)

We have in Kentucky a revenue system which throws around tax-payers in general every possible protection against the ignorance or prejudice of assessing officers and

boards of review, and leaves a small minority at the mercy of an irresponsible board, empowered to act at its own discretion, without actual or substantial constructive notice to the parties to be affected, and under no obligation to hear them, unless they discover for themselves that their "taxes are to be increased," and demand a hearing.

The discrimination thus made in favor of the one and against the other of these two classes of tax-payers is so clear and palpable as to render further discussion unnecessary. It was to prevent such discriminations, and to take from the State Legislatures the power to exercise such arbitrary and oppressive discretion, that the Fourteenth Amendment declared that no State shall deprive any person within its jurisdiction of the equal protection of the laws.

The Court of Appeals cite the State Railroad tax cases (*2d Otto*, 575) as in effect sustaining their decisions. So far as the opinion in those cases throws any light upon the question of the equal protection of the laws in matters of taxation, it condemns in the most unqualified manner the very discrimination against which we are protesting.

The State Board of Illinois equalized taxation in all the counties of the State, as well as among all the Railroad Companies. No tax-payer was entitled to notice of what it was about to do. Of this the Railroad Companies complained. The Court disposed of their complaint thus:

"The statute requires the proper officers of the Railroad Companies to furnish to the State Auditor a schedule of the various elements mentioned as necessary in applying the statutory rule of valuation. It is charged that the Board of Equalization increased the estimates of value so reported to the Auditor without notice to the companies, and without sufficient evidence that it ought to be done; and it is strenuously urged upon us that, for want of this notice, the whole assessment of the property and levy of taxes is void.

"It is hard to believe that such a proposition can be seriously made. If the increased valuation of property by the Board without notice is void as to Railroad Companies, it must be equally void as to every other owner of property

in the State. When the value assessed upon it by the local assessor has been increased by the Board of Equalization, how much tax would thus be rendered void it is impossible to say. The main function of this Board is to equalize these assessments over the whole State. If they find that a county has had its property assessed too high in reference to the general standard, they may reduce its valuation. If it has been fixed too low, they raise it to that standard. When they raise it in any county, they necessarily raise it on the property of every individual who owns any in that county. Must each one of these have notice and a separate hearing? If a Railroad Company is by law entitled to such notice, surely every individual is equally entitled to it. Yet, if this be so, the expense of giving notice, and the delay of hearing each individual, would render the exercise of the main function of this Board impossible. The very moment you come to apply to the individual the right claimed by the corporation in this case, its absurdity is apparent; nor is there any hardship in the matter. This Board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and in the business of assessing taxes, this is all that can be reasonably asked."

It may be deduced from this extract that due process of law does not entitle each tax-payer to actual notice of the fact that a Board of Review, engaged in the work of equalizing taxation, is about to increase his proportionate share of the tax burden by the increase of the original valuations fixed upon his property. But, on the other hand, the rule is distinctly recognized, that if the law requires actual notice to be given to one class of tax-payers, then all others may demand that like notice shall be given to them.

"If a Railroad Company is by law entitled to such notice, surely every individual is equally entitled to it." *Ergo*, "If every individual be entitled to actual notice, surely every Railroad Company is equally entitled to it."

And this is the extent of our claim, and less than this will deny to the Railroad Companies the equal protection of the law.

The Court of Appeals intimates that the discrimination complained of can be remedied in but one way: by frag-

mentary assessments in the several counties by the county assessor, subject to revision by the county supervisors or the county judge. This is by no means a logical conclusion. The Railroad Companies do not complain of the assessment upon the theory that each road is an entirety. They do not complain that the Board of Equalization has power to review and correct the valuations returned. Their complaint is, that they are not protected equally with other tax-payers in the way of notice and the right of appeal. The Franklin Circuit Court is by law the fiscal Court of the Commonwealth. It holds a special session each year for the trial of actions and motions in favor of the Commonwealth. (*Article* 9, *chapter* 28, *General Statutes*.)

Its sessions are held in the city of Frankfort. Appeals from the valuations of the Board of Equalization to that Court would involve no more delay than do the appeals by individual tax payers first to the county and then to the Circuit Court of their respective counties.

The equal protection of the laws can be extended to the complaining tax-payers without serious detriment to the public interests, and in demanding it, they are but insisting upon a right guaranteed them by the Federal Constitution.

It is not conceded that the opinion in the Illinois Railroad tax cases goes to the extent of holding that there can be constitutional taxation without giving the tax-payer an opportunity to be heard at some point in the proceeding in defense of the list and valuations he has given in.

The question of what constitutes "due process of law" does not seem to have been discussed by counsel, or considered by the Court in those cases. They turned upon the construction of the Illinois statutes, and their validity under the Constitution of that State. The validity of those statutes was not seriously questioned on the ground of any conflict with the Constitution of the United States. The opinion does not deny the rule stated by Judge Cooley:

"We should say that notice of proceedings in such cases, and an opportunity for hearing of some description, were matters of constitutional right. It has been customary to provide for them as part of what is 'due process of law' for these cases; and it is not to be assumed that constitutional provisions, carefully framed for the protection of property, were intended or could be construed to sanction legislation under which officers might secretly assess for any amount in their discretion, without giving him an opportunity to contest the assessment." (*Cooley on Taxation*, 266.)

And the cases were controlled in some degree by the attitude of the Railroad Companies in seeking orders of injunction, without paying or offering to pay the taxes fairly due the State, as also by the provision of the State Constitution authorizing the taxation of corporations owning or using franchises and privileges, in such manner as the Legislature should, from time to time, direct, "by general law uniform as to the class upon which it operates."

It is worthy of consideration, too, that the Court of Appeal decides expressly that the Kentucky act of 1878 was not intended to create a Board of Equalization like the Illinois board, but "an assessing board," whose valuations must stand.

CONSTITUTIONAL TAXATION.

"An exact equalization of taxation is unattainable and utopian; but still there are well defined limits within which the practical equality of the Constitution may be preserved, and which should be deemed impossible barriers to legislative power. Taxation may not be universal, but it must be general and uniform; hence, if a corporation tax be laid, none of the class of persons thus taxed can be constitutionally exempt upon any other ground than that of public service; and if a tax be levied on land, no land within the limits of the State can be constitutionally exempted, unless the owner be entitled to such immunity on the ground of public service. * * * * * * * * * * * * * * * The distinction between constitutional taxation and the taking of private property for public use by legislative will,

may not be definable with perfect precision; but we are clearly of the opinion that, whenever the property of a citizen shall be taken from him by the sovereign will, and appropriated without his consent to the benefit of the public, the exaction should not be considered a tax, unless similar contributions be made by that public itself, or shall be exacted rather by the same public will from each constituent member of the same community generally as own the same kind of property." (*McQuillan's Case*, 9 *Dana*, 513, 516.)

"Perfect equality in the imposition of local taxation cannot be attained, but uniformity in the manner of assessment and approximate equality in the amount of the exactions are certainly within the range of possibility; and such uniformity and approximate equality were, by this Court, in the case of *McQuillan's heirs*, held to be essential to the constitutionality of such taxation." (*Howell vs. Bristol*, 8 *Bush*, 498.)

"Uniformity and equality of taxation is of the essence of the power." (*Barbour vs. Board of Trade, Ky. Law Reporter, June*, 1885, *p.* 773)

"That absolute arbitrary power over the lives, liberty, and property of freemen, exists nowhere in a republic, not even in the largest majority." (*Sec.* 3, *art.* 13, *Kentucky Constitution.*)

These extracts fix and determine the character of constitutional taxation in Kentucky.

By the rule which they recognize and establish, the equality and uniformity of the burdens imposed upon the different classes of tax-payers by the Kentucky revenue system are to be tested.

It is not enough to make taxation equal and uniform that the valuation of property within a particular class shall be taxed the same rate per centum. It must be taxed in proportion to its value, and its value must be ascertained by a "process of law," the governing principles of which are the same, whether applied to one class of tax-payers or another, or enforced through the action of one tribunal or many.

"Whatever may be the basis of taxation, the requirement that it shall be uniform is universal. To render taxation uniform in any case, two things are essential; the first

of these is, that each taxing district should confine itself to the object of taxation within its limits. The second essential is, that there should be uniformity in the manner of assessment, and approximate equality in the amount of exactions within each district." (*Cooley's Con. Limitations*, 624.)

"Taxing by a uniform rule requires uniformity, not only in the *rate* of taxation, but also uniformity in the *mode of assessment* upon the taxable valuation. Uniformity in taxing implies equality of in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment as well as in the rate of taxation." (*Ex. Bank of Col. vs. Hines*, 3 *Ohio St.*, 15.)

The above was quoted by this Court with approbation in *Cummings vs. National Bank* (101 *U. S.*, 158).

It is the same with the Kentucky rule: "*Uniformity in the manner of assessment, and approximate equality in the amount of the exactions, are certainly within the range of possibility*," and are essential to the constitutionality of taxation. (*Howell vs. Bristol*, 8*th Bush*, 498).

If the Kentucky revenue system provided that all tax-payers, assessing more than one hundred thousand dollars worth of property, should have the right to actual notice, and the opportunity to be heard in defense of their tax-lists as reported by the assessor, and the right to appeal from the valuations fixed by the Board of Supervisors, first to the County Court; and if still dissatisfied, to the Circuit Court, and made no provision for notice to persons listing property worth less than one hundred thousand dollars, and afforded them no opportunity to be heard, unless they should wait upon the sittings of the Board to see whether their taxes were to be increased, and gave them no appeal, either to the county or the Circuit Court, no one would hesitate to say that the latter class of tax-payers were denied the equal protection of the laws. If the favored class was made up of tax-payers of the Caucasian race, and the other of tax-payers of African descent, the inequality of the protection afforded would be no more manifest and glaring; and as, in the matter of taxation, no distinction

can be taken between individuals and business corporations owning and listing property of the same character within the same classification, it is equally as much against the Constitution to deny to corporations the equal protection of the laws as to deny it to persons of African descent.

CLASSIFICATION OF RAILROAD PROPERTY.

Railroads, with their attachments, including rolling stock, have always been treated in Kentucky as entireties, and in that character they have always been taxed. (*Applegate vs. Ernst*, 3 *Bush*, 650; *E. P. & R. R. vs. Elizabethtown*, 12 *Bush*, 238.)

"The perpetual right of way, with substructure of wooden and iron fixtures, legally constitute what is called immovable in contradistinction to movable property; and as the road, with all its movable attachments, is an entirety, it altogether belongs essentially to the classification of real estate." (*Copeland vs. Copeland*, 7 *Bush*, 350)

The fourth section of the act of 1878, providing for the Board of Equalization, recognizes this distinctive classification of railroad property.

It provides that "the same rate of taxation for State purposes, which is or may be in any year levied on *other real estate in this Commonwealth shall be*," *etc.* *

And again:

"And the same rate of taxation for the purposes of each county, city, town, or precinct, in which any portion of any railroad is located, which is or may be in any year levied on *other real estate* therein, *shall be, &c.*" *

Railroads and their attachments being within the classification of real estate, must be valued as other real estate. Their owners lose none of their rights in this regard, because they enjoy greater rights and privileges in the use of their property than ordinarily pertains to the individual owners of real estate, as the Court of Appeals seems to intimate. If they do enjoy extraordinary rights and privileges, they render extraordinary services to the

* The italics are ours.

public. Whether the business of operating a railroad may be subjected to special taxation in the way of licenses similar to those which tavern-keepers, merchants, brokers, peddlers, &c., are required to take out, we will not stop to consider. Certain it is, no such license is now required of Railroad Companies, and they cannot be denied the equal protection of the laws in the valuation of their real estate on the ground that they might be required to pay special taxes in the way of license fees.

The power reserved by the act of February 14, 1856, to amend or repeal at will all charters and grants of, or to corporations or amendments thereof, unless a contrary intent be therein plainly expressed, does not affect the question of taxation or enlarge the powers of the State in regard thereto.

Commenting upon a reservation of this character contained in acts of Congress relating to the Union Pacific Railroad Company, the Chief Justice, in the Sinking Fund cases, said:

"Taking both acts together, and giving the explanatory statement in that of 1862 all the effect it can be entitled to, we are of opinion that Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power."

No reservation could be more comprehensive or complete. Yet the Chief Justice continued:

"That this power has a limit no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made." (99 *U. S. Reports*, 720.)

In *Shields vs. Ohio* (95 *U. S.*, 324) it was held:

"The alterations must be reasonable; they must be made in good faith, and be consistent with the object and scope of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or altera-

tion. (See also *Sage vs. Dillard*, 15 *B. Mon.*, 340; *Commonwealth vs. Essex*, 13 *Gray*, 239.)

In his dissenting opinion in the Sinking Fund cases, Mr. Justice Bradley concluded his discussion of the effect of the reserved power under consideration thus:

"Certainly the Legislature cannot in a charter of incorporation, or in any other law, reserve to itself any greater power of legislation than the Constitution itself concedes to it. It seems to me clear, therefore, that the power reserved cannot authorize a flat abrogation of the contract by Congress, because, as before shown, such an abrogation would be a violation of those clauses which inhibit the taking of private property without process of law, and without compensation."

That such reservations secure to the States the power to regulate and control the operations and management of the corporate business, as fully as might have been done if the contract clause had been omitted from the Federal Constitution we do not deny, but they cannot and do not empower the State to deprive the corporation of its property at will, or to tax it without regard to constitutional limitations. The charter of the Louisville & Nashville Railroad Company antedates the act of 1856, and that corporation is not affected by its provisions.

CONCLUDING SUGGESTIONS.

Other questions were discussed in the State Courts, some of which may be presented here. In the main, they involve the construction of State statutes, and their validity as tested by the provisions of the State Constitution. We do not ask this Court to review the decision of the Court of Appeals, so far as the most of those questions are concerned. We do not admit, however, that this Court is bound by a change of interpretation, made for the first time in these cases, the effect of which tends to defeat or impair the security guaranteed by the Fourteenth Amendment to all persons within the jurisdiction of the State of Kentucky.

If the highest Court of that State, by a series of well considered decisions, running back nearly half a century, has unmistakably declared the nature and character of constitutional taxation, and the essential elements of "due process of law," in relation to the imposition and apportionment of taxation, a departure from the established rules of construction upon these fundamental propositions will not be followed by this Court, if thereby parties litigant are deprived of their property "without due process of law," as it was understood and enforced up to the time at which such parties demanded protection in virtue of the provisions of the amended Federal Constitution.

We do not admit, either, that the interpretation by the State Court of a provision of the State Constitution, the same essentially with a like provision in the Federal Constitution, can, to any extent whatever, embarrass this Court when it comes to interpret the like provision of the Federal Constitution.

It matters not that the act of 1864, by which railroads were arbitrarily valued at $20,000 per mile for the purposes of taxation, was upheld and enforced by the State Courts. It was said in 1 Bush (250) that the object of this act was "to fix a specific instead of *ad valorem* tax." It was regarded as in the nature of a license tax or a tax on franchises and privileges. Whether or not it was properly so regarded need not now be inquired into. Certain it is, the act denied to Railroad Companies the equal protection of the laws; and if the point had been made at any time subsequent to 1869, we doubt not it would have been held that the adoption of the Fourteenth Amendment abrogated and annulled its provisions.

Finally, we submit: It was intended by the Kentucky Legislature that the valuations of the Board of Equalization should be final and conclusive; that the Railroad Companies should have no actual notice of the proceedings of

that Board, and no reasonable opportunity to be heard in defense of the valuations returned by their principal officers.

That these intentions were expressed by the act of April 3d, 1878, on the day following the approval of the act of April 2d, 1878, by which actual notice, with full opportunity to be heard, and the right of appeal, were unequivocally secured to all the other tax-payers of the Commonwealth.

That this manifest discrimination against the Railroad Companies denies, and was intended to deny, to them the equal protection of the laws, and to deprive them of their property without due process of law.

The reversal of each of the judgments complained of is most respectfully asked.

WM. LINDSAY,
For Lou. & Nash. R. Co.
HOLMES CUMMINS,
For C., O. & Southwestern R. Co.
C. B. SIMRALL,
For Cin., N. O. & Tex. P. R. Co.

For the sake of convenience, we annex, as an addenda to our brief, the Revenue Laws of the State of Kentucky, providing for the assessment of property for taxation.

AN ACT TO PRESCRIBE THE MODE OF ASCERTAINING THE VALUE OF THE PROPERTY OF RAILROAD COMPANIES FOR TAXATION, AND FOR TAXING SAME.

(BULLITT AND FELAND'S GEN'L STATS. OF KY., 1881, P. 1019.)

SECTION 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That the president or chief officer of each railroad company, or other corporation owning a railroad lying in this State, shall, in the month of July in each year, return to the Auditor of Public Accounts of the State, under oath, the total length of such railroad, including the length thereof beyond the limits of the State, and designating its length within this State, and in each county, city, and incorporate town therein, together with the average value per mile thereof, for the purpose of being operated as a carrier of freight and passengers, including engines and cars and a list of the depot grounds and improvements, and other real estate of the said company, and the value thereof, and the respective counties, cities, and incorporated towns, in which the same are located. That if any of said railroad companies owns or operates a railroad or railroads out of this State, but in connection with its road in this State, the president or chief officer of such company shall only be required to return such proportion of the entire value of all its rolling stock as the number of miles of its railroad in this State bears to the whole number of miles operated by said company in and out of this State.

How assessment made.

SECTION 2. That should any railroad, or part of a line of railroad, in this State, be in the hands or under the control of a receiver or other person, by order or decree of any Court in this or any other State, it shall be the duty of such receiver or other person to make, under his oath, the returns and valuations required by the first section of this act; and should such president or chief officer of any railroad company, or such receiver, fail to make said returns and valuations on or before the first day of August in each and every year, the said Auditor shall proceed and ascertain the facts and values required by this act to be returned, and in such manner and by such means as he may deem best, and at the cost of the company failing to make the returns and values.

When in hands of receiver.

First of August. In event of failure to report, auditor to, etc.

SECTION 3. That the Governor of the State, on or before the first day of August, 1878, shall appoint three disinterested freeholders, citizens of this State, who shall constitute a Board of Equalization, who shall meet annually at the office of the Auditor in Frankfort, on the first day of September in each year, a majority present constituting a quorum for the transaction of business; and at the said meetings the Auditor shall lay before them the returns made to him under this act, and any schedules and valuations as he may have made under the second section hereof; and should the valuations, or any of them, in the judgment of said Board, be either too high or too low, they shall correct and equalize the same by a proper increase or decrease thereof. Said Board shall keep a record of their proceedings, to be signed by each member present at any meeting; and the said Board is hereby authorized to examine the books and property of any railroad company to ascertain the value of its property, or to have them examined by any suitable disinterested person, to be appointed by them for that purpose. The members of said Board shall hold their office for the term of four years, and shall receive for their services ten dollars per day, and all traveling and other necessary expenses whilst in actual service: *Provided*, That said service shall not be for a longer

Board of Equalizat'n

Quorum.

Proceedings to be signed by, etc.

Four years.

Compensation of Board.

period of time than twenty days in any one year; and before proceeding to act under their appointment, they shall take an oath before the Governor of the State, that they will faithfully and impartially perform their duties as members of said Board of Equalization; and in case of the death, resignation of either, or failure to act, the Governor shall fill the vacancy by another appointment. Vacancy.

SECTION 4. The same rate of taxation for State purposes, which is or may be in any year levied on other real estate in this Commonwealth, shall be, and is hereby, levied upon the value so found by the said Board, of the railroad, rolling stock, and real estate of each company; and the same rate of taxation for the purposes of each county, city, town, or precinct, in which any portion of any railroad is located, which is or may be in any year levied on other real estate therein, shall be, and is hereby, levied on the value of the real estate of said company therein, and of the number of miles of such road therein, reckoned as of the value of the average value of each mile of such railroad with its rolling stock, as ascertained as aforesaid. And immediately after the said Board shall have completed its valuations each year, the Auditor of Public Accounts shall notify the Clerk of each County Court of the amount so assessed for taxation in his county, and each railroad company of the amount of its assessment for taxation for State purposes, and for the purposes of such county, city, town, or precinct. And all existing laws in this State, authorizing the assessment and taxation of the property of railroad companies by counties, cities, or incorporated towns, are hereby repealed; and no county, city, or incorporated town in this State, shall hereafter assess, levy, or collect any taxes on the property of railroad companies of this State, except as provided by this act. Rate of Taxation. Auditor to notify County Clerks. One valuation for State and County purposes.

SECTION 5. All taxes levied under the provisions of this act shall be paid on or before the 10th day of October in each year; and for a failure to pay the same, the officers of the said companies shall be subject to the same penalties to which they are now subject for a failure to pay the taxes To be paid 10th October.

now levied by law. And the taxes, in behalf of the Commonwealth, may be recovered by action in the Franklin Circuit Court, and those in behalf of the counties by actions in the Courts of Civil Common Law jurisdiction in such counties, respectively.

SECTION 6. That all laws, in conflict with this act, are repealed.

SECTION 7. This act shall take effect from its passage.

Approved April 3, 1878.

AN ACT TO PREVENT EXTORTION AND DISCRIMINATION IN THE TRANSPORTATION OF FREIGHT AND PASSENGERS BY RAILROAD CORPORATIONS, AND IN AID OF THAT PURPOSE TO ESTABLISH A BOARD OF RAILROAD COMMISSIONERS, AND DEFINE ITS POWERS AND DUTIES.

(ACT OF APRIL 6TH, 1882. GEN'L LAWS OF KY., SESSION ACTS, 1882, VOL. I, P. 66.)

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Extortion—when guilty of.

SECTION 1. If any railroad corporation shall willfully charge, collect, or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this State, or for the use of any railroad car upon its track, or upon any track of which it has control or the right to use in this State, it shall be guilty of extortion, and, upon conviction, shall be punished as prescribed by this act.

Discriminations prohibited.

SECTION 2. If any railroad corporation shall willfully charge, collect, or receive from any person or persons, for the transportation of any freight upon its railroad, a higher or greater rate of toll or compensation than it shall at the same time charge, collect, or receive from any other person or persons for the transportation of the like quantity of freight of the same class, being transported from the same point, in the same direction, over equal distances of the same railroad, or if it shall charge, collect, or receive from any person or persons, for the use and transportation of any railroad car or cars upon its railroad a higher or greater sum than it shall at the same time charge, collect, or receive from any other person or persons for the use or transportation of a car or cars of the same class for a like purpose, from the same point, in the same direction, and an equal distance; all such discriminating rates, charges, or collections, whether made directly or by means of any re-

bate, or other shift or evasion, shall be considered and taken as *prima facie* evidence of discrimination, which is hereby prohibited and declared unlawful, and shall be punished as prescribed by this act. When one or more car-loads of freight shall be transported at the same time for different persons, and for each shipper a car-load or more, such shipments shall be considered and taken as the same quantity of freight within the meaning of this act; and when less than a car-load of freight, and over five thousand pounds, are transported at the same time for different shippers, and for each shipper over five thousand pounds, such shipments shall be considered and taken as the same quantity of freight; and when over five hundred pounds, and less than five thousand pounds, are transported at the same time for different shippers, and for each shipper said quantity of freight, such shipments shall be considered and taken as the same quantity of freight.

SECTION 3. Nothing contained in this act shall be construed to prohibit railroad corporations from issuing commutation, excursion, or thousand-mile-tickets, as are now issued, nor as controlling the rates of freight which come from and go beyond the boundaries of the State, nor as excluding other evidence of extortion or unlawful discrimination.

Penalty.

SECTION 4. Any railroad corporation that shall be guilty of extortion or unlawful discrimination shall, upon conviction, be fined for the first offense in any sum not less than one hundred dollars, nor more than one thousand dollars; and upon a second conviction, in any sum not less than five hundred dollars, nor more than two thousand dollars; and upon a third conviction, in any sum not less than two thousand dollars, nor more than five thousand dollars. The Circuit Court, or court of similiar jurisdiction, of any county into or through which the line of railroad may run owned by the corporation alleged to be guilty as aforesaid, shall have jurisdiction of the offense, which shall be prosecuted by indictment or by action in the name of the Commonwealth, upon information filed by

the Board of Railroad Commissioners; and in all prosecutions and actions against railroad corporations under this act, a preponderance of the evidence shall govern and control the jury in making their verdict. And such railroad corporation shall also be liable in damages to the party aggrieved three times to the amount of the damages sustained, together with costs of suit and a reasonable attorney's fee, to be fixed by the Court.

Governor to appoint Com'nrs.

SECTION 5. The Governor, during the present session of the General Assembly, shall, by and with the advice and consent of the Senate, appoint three competent persons as Commissioners, who shall constitute the Board of Railroad Commissioners, who shall hold their offices until the next meeting of the General Assembly, and until their successors are appointed and qualified. At the next meeting of the General Assembly, and every two years thereafter, the Governor, by and with the advice and consent of the Senate, shall appoint three competent persons as such Commissioners, who shall hold their offices for the term of two years from the first Monday in the year of their appointment, and until their successors are appointed and qualified. For the purposes of this act, the State shall be divided into three districts, to be called the Eastern, the Middle, and the Western Districts, and the Governor shall appoint one Commissioner from each district, who shall now be and shall continue to be during his term of office, a resident of the district from which he is appointed.

Eastern District.

The Eastern District shall be composed of the following counties, to-wit: Boone, Kenton, Grant, Harrison, Bourbon, Clark, Estill, Madison, Jackson, Laurel, Rockcastle, Whitley, Knox, Bell, Harlan, Leslie, Perry, Letcher, Floyd, Pike, Martin, Johnson, Breathitt, Clay, Owsley, Lee, Powell, Montgomery, Bath, Nicholas, Fleming, Robertson, Pendleton, Bracken, Campbell, Lewis, Mason, Greenup, Rowan, Carter, Elliott, Boyd, Lawrence, Morgan, Magoffin, Wolfe, Menifee.

Middle District.

The Middle District shall be composed of the following counties, to-wit: Gallatin, Owen, Scott, Fayette, Jes-

samine, Pulaski, Wayne, Clinton, Russell, Casey, Lincoln, Garrard, Boyle, Mercer, Anderson, Woodford, Franklin, Henry, Oldham, Carroll, Trimble, Jefferson, Shelby, Spencer, Bullitt, Nelson, Washington, Marion, Taylor, Green, Adair, Cumberland.

Western District.

The Western District shall be composed of the following counties, to-wit: Meade, Hardin, Larue, Hart, Metcalfe, Barren, Monroe, Allen, Simpson, Warren, Edmonson, Grayson, Breckinridge, Hancock, Ohio, Butler, Logan, Todd, Muhlenburg, McLean, Daviess, Henderson, Webster, Hopkins, Christian, Trigg, Caldwell, Lyon, Crittenden, Union, Livingston, Marshall, Calloway, Graves, McCracken, Ballard, Hickman, Fulton.

Qualification of commissioners.

SECTION 6. No person shall be appointed as such Commissioner who is under twenty-five years of age, or who is directly or indirectly interested in any stock, bond, or other property of, or is in the employment of any railroad company; and no person appointed as such Commissioner shall, during the term of his office, become interested in any stock, bond, or other property of any railroad company, or be employed by any railroad company. The Governor shall have power to fill vacancies in the office of any such Commissioner until the meeting of the Senate.

Oath.

SECTION 7. Before entering upon the duties of his office, each of said Commissioners shall make and file with the Secretary of State an affidavit that he will faithfully discharge the duties of the office of Commissioner of Railroads without favor or partiality, to the best of his ability.

Salary.

SECTION 8. Each of said Commissioners shall receive for his services the sum of not exceeding two thousand dollars per annum, payable quarterly; they shall be furnished with an office, furniture, and stationery at the expense of the State. The total sum to be expended by said Commissioners for office rent, furniture, and stationery shall not exceed eight hundred dollars per annum. The office of said Commissioners shall be kept at Frankfort.

Statement to be made by railroad company.

SECTION 9. Every railroad company shall, on or before the first day of September in each year, make and transmit to the Commissioners, at their office in Frankfort, under oath of the proper officers of the corporation, a full and true statement of the affairs of said corporation as the same existed on the first day of the preceding July, specifying:

1st. The amount of capital stock paid up, and the names of the owners thereof, and amounts owned by each, and the residence of each stockholder as far as known.

2nd. The amount of its assets and liabilities.

3rd. The names and place of residence of its general officers.

4th. The amount of cash paid to the company on account of the original capital stock.

5th. The amount of funded debt.

6th. The amount of floating debt.

7th. The estimated value of the road-bed, including iron and bridges.

8th. The estimated value of rolling stock.

9th. The estimated value of stations, buildings, and fixtures.

10th. The estimated value of other property.

11th. The length of single main track.

12th. The length of double main track.

13th. The length of branches, stating length of single and of double track.

14th. The aggregate length of siding and other tracks not above enumerated.

15th. The number of miles run by passenger trains during the year preceding the making of the report.

16th. The number of miles run by freight trains during the same period.

17th. The number of tons of through freight carried, and the number of tons of local freight during the same time.

18th. The monthly earnings for the transportation of passengers during the same time.

19th. The monthly earnings for the transportation of freight during the same time.

20th. The monthly earnings from all other sources respectively.

21st. The amount of expense incurred in running of passenger trains during the same time.

22nd. The expense incurred in running freight trains and in running mixed trains during the same time.

23rd. All other expenses incurred in the management of the road, including the salaries of officers, which shall be reported separately.

24th. The amount expended for repairs of road and maintenance of way, including repairs and renewals of bridges and renewals of iron.

25th. The amount expended for improvements, and whether the same are estimated as a part of the expenses of operating or repairing the road, and if either, which?

26th. The amount expended for motive power and cars.

27th. The amount expended for station houses, buildings, and fixtures.

28th. All other expenses for maintenance of way.

29th. All other expenses for other purposes.

30th. The rate of fare for passengers for each month for the same time, through and way passengers separately.

31st. The tariff of freights, showing each change of tariff during the same time, and a copy of each published rate for passengers and freight issued to its agents during the same time, and whether the published rates were those actually received; if not, what were received.

32nd. The number of tons of freight carried one mile.

33rd. The amount received per ton, per mile.

34th. The average distance each ton was hauled, and the average cost of hauling a ton of freight one mile.

35th. What freight and transportation companies run

on its road, and on what terms, and whether such transportation companies use the cars of the railroad company, or cars furnished by themselves.

36th. Whether the freight or cars of such transportation companies are given any preference in speed or order of transportation; and if so, in what particular?

Interrogatories.

SECTION 10. The said Commissioners may propound any additional interrogatories, which shall be answered by such companies in the same manner as those specified in the foregoing section.

When to report.

SECTION 11. Said Commissioners shall, on or before the first day of December in each year, and oftener if required by the Governor to do so, make a report to the Governor of their doings for the preceding year, containing such facts as will disclose the practical workings of the system of railroad transportation in this State, and such suggestions in relation thereto as to them may seem appropriate.

Other duties.

SECTION 12. Said Commissioners shall examine into the condition, management, and all other matters concerning the business of railroads in this State, so far as the same pertain to the relation of such railroads to the public; and whether such railroad corporations, their officers and employes, comply with the laws of this State. And whenever it shall come to their knowledge, or they shall have reason to believe that the laws affecting railroad corporations in their business relations to the public have been violated, they shall prosecute, or cause to be prosecuted, the corporations or persons guilty of such violation.

Power of the Commissioners.

SECTION 13. Said Commissioners shall have power to examine, under oath, the directors, officers, agents, and employes of any railroad corporation concerning the management of its affairs, and to obtain information pursuant to this act; and shall have power to issue subpœnas for the attendance of witnesses, and to administer oaths. In case any person shall willfully refuse or fail to obey such subpœna, it shall be the duty of the circuit court, or any

court of similar jurisdiction of the county, upon applicati of said Commissioners, to issue an attachment for such witnesses, and compel them to attend before the Commissioners, and give testimony upon such matters as may be lawfully required of them, and may punish for contempt as in other cases.

Neglect of process, etc

SECTION 14. Any person who shall willfully neglect or refuse to obey the process of subpœna issued by said Commissioners, and appear and testify as therein required, shall be deemed guilty of a misdemeanor, and shall be liable to indictment in any court of competent jurisdiction, and, upon conviction thereof, shall be punished for each offense by a fine of not less than ten dollars nor more than one hundred dollars, or by imprisonment not more than ————days, or both, in the discretion of the jury.

Refusal to report.

SECTION 15. Every corporation, and every officer or agent that shall willfully neglect or refuse to make any report required in this act at the time herein required, or who shall intentionally hinder and obstruct said Commissioners in the discharge of the duties hereby imposed upon them, shall be fined in the sum of not less than fifty nor more than one hundred dollars, to be recovered upon an indictment, or by an action in the name of the Commonwealth, to be instituted by said Commissioners.

Attorney-Gen'l and Commonwealth's Attorney.

SECTION 16. It shall be the duty of the Attorney General and the Commonwealth's Attorney in the circuit in which proceedings may be instituted, upon the request of the Commissioners, to institute and prosecute all actions and proceedings authorized by this act.

SECTION 17. This act shall not apply to any street railroad.

What included.

SECTION 18. The term railroad corporation, as used in this act, shall be construed to include any person, association, or company operating a railroad, whether incorporated or not. And any association, company, or corporation extorted upon or discriminated against, shall be included in the term person, as used in this act.

Duties and powers of the Commissioners.

SECTION 19. Said Commissioners shall hear and determine complaints under the first and second sections of this act. Such complaints shall be made to said Commissioners in writing, and they shall give the company complained of not less than ten days' notice of the time and place of hearing the same. They shall hear the evidence of the parties, and award judgment as authorized by this act. Unless the same be satisfied, the chairman shall, within ten days, file a copy of said award in the office of the clerk of the circuit court of the county which, under the Code of Practice, would have jurisdiction of such controversy, on which execution shall issue as on other judgments: *Provided*, That any party dissatisfied with said award may, within ten days, file a traverse thereof with the clerk of said court, who shall docket the same for trial at the next term. If the matter in controversy shall exceed twenty dollars, said court, on demand of either party, shall empanel a jury to try the same. If it does not exceed that sum, the court shall hear and summarily decide the same without the intervention of a jury.

SECTION 20. This act shall take effect from and after its passage.

Approved April 6th, 1882.

AN ACT TO AMEND AN ACT, ENTITLED "AN ACT TO PRESCRIBE THE MODE OF ASCERTAINING THE VALUE OF PROPERTY OF RAILROAD COMPANIES FOR TAXATION, AND FOR TAXING THE SAME," APPROVED APRIL 3RD, 1878.

(ACT OF APRIL 19TH, 1882, GEN'L LAWS OF KY., SESSION ACTS 1882, VOL. I, P. 99.)

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Board of Railroad Commissioners—duties extended.

SECTION 1. That the Board of Railroad Commissioners appointed under an act, entitled "An act to prevent extortion and discrimination in the transportation of freight and passengers by railroad corporations, and in aid of that purpose to establish a Board of Railroad Commissioners, and define its powers and duties," approved April 6th, 1882, shall perform all the powers and duties conferred upon the Board of Equalization by the act to which this is an amendment.

SECTION 2. This act shall take effect from and after its passage.

Approved April 19th, 1882.

REVENUE AND TAXATION.

PROPERTY TAXED.

(GEN'L STATUTES OF KY., ART. I, CHAPT. 92, BULLITT AND FELAND'S GEN'L STATUTES OF KY., 1881, P. 710.)

Date to which list shall apply, and property embraced.

SECTION 4. Property shall be listed for taxation, as of the tenth of January of each year, by the assessor, as follows:

1. Land and town lots, or any interest therein, including life estates and leases, for a term having two years or more to run, all to be listed in the county where situated.

2. Horses, mares, mules, jacks and jennets.

3. Cattle.

4. Gold, silver, and other metallic watches, clocks composed in whole or part of metal or wood, gold and silver plate, pianos, riding or pleasure carriages, buggies, gigs, sulkies, stage coaches, omnibuses, and all descriptions of vehicles for the transportation of persons or passengers, by whatever name known or called, including the harness thereof, whether in use or not; but such of the above named property as is kept for sale in the shop of a manufacturer thereof, or store of a merchant, shall be listed as stores and merchandise are required to be listed.

Oath of person rendering the list as to all other sources of wealth

SECTION 5. The assessor, after having taken the lists of all property required to be listed, as above, shall require each person, on oath, to fix the amount he or she is worth from all other sources on the day to which said list relates, after taking out his or her indebtedness from said amount. And the said assessor shall take from the said amount so assessed and listed the sum of one hundred dollars, and set down and list the balance for taxation. This section includes all property not exempt from taxation, other than that mentioned in section four, whether manufactured, produced, purchased, or otherwise procured, such as spirituous liquors and all mixtures thereof, the

produce of mines, farms, forests, and other productions of the earth, manufactured articles of all kinds, and all property of every sort and description, notes, accounts, bonds, bills of exchange, and choses in actions, debts, and demands of every kind; but does not include lands or other property not within this State, subject by law to tax, and actually taxed, by the State or county where situated, nor bank or other stocks when the bank or other institution or corporation in which it is held is required to pay tax on the same.

Indebtedness to be deducted.

SECTION 6. The indebtedness which may be deducted as aforesaid must be just and honest debts owing as principal, and not as surety, and created for a valuable consideration, which the person intends to pay, and not with a view to lessen the amount of his taxable property. The assessor, in taking in the list, shall swear the person listing to the facts herein stated and required, and, upon such person refusing to take said oath, he or she shall not be entitled to the deduction of his or her indebtedness, and be reported to the county court.

Title holders of land—who to pay tax.

SECTION 7. The holder of the legal title, and the holder of the equitable title, and the claimant in possession of land on the tenth of January, are all liable for the tax on it to the Commonwealth. But as between themselves, it is the duty of the holder of the equitable title to list it, and pay the taxes, whether in possession or not.

THE ASSESSOR AND HIS DUTIES.

(GEN'L STATS. OF KY., ART. 5, CHAP. 92, BULLITT AND FELAND'S GEN'L STATS. OF KY., 1881, P. 718.)

Assessor to be fined for failure to accept office.

SECTION 1. Any person elected or appointed assessor of tax, who shall willfully fail to accept the office and assume the duties thereof, shall be fined the sum of five hundred dollars. The assessor may appoint, with the approval of the County Court, as many sober, discreet, capable persons, not under the age of twenty-four years, to assist him in the discharge of his duties, as he may deem necessary. They may be removed by him at his pleasure.

Form of Assessor's oath.

SECTION 2. The assessor and his assistants, before they enter upon the duties of the office, in addition to the oath prescribed in the Constitution, shall also take the following oath: "You do swear that you will fix a fair and full value on all the property listed by you, without favor or partiality; that you will diligently search and inquire so that no person shall be passed over, or shall fail to have an opportunity to give in his list of taxable property; and that you will truly report all persons who shall fail or refuse to give in a list of their taxable property after being duly called on for that purpose, or who have given in a false or fraudulent list, or refused to give in the amount of their residuary estate as required by law—so help you God."

Assessor's bond.

SECTION 3. The assessor shall also, at the same time, give bond to the Commonwealth, in the county court, with good surety, for the faithful discharge of the duties of his office, which bond shall be recorded and kept by the clerk thereof; and for a violation or breach of it, action may be instituted on it by the Commonwealth, or any person aggrieved, and recovery had thereon, from time to time, to the extent of the injury sustained.

Commence duty on 10th January and complete by 1st May.

SECTION 4. He may commence the duties of his office on the tenth day of January in each year, and shall complete his list and return his tax-book to the county clerk by the first day of May in each year.

Tax-book of previous year--when to be furnished the sheriff.

SECTION 5. If, from any cause, the tax-book for the year be not returned by the assessor, the county clerk shall copy and deliver to the sheriff the tax-book of the previous year, by the first day of June, take his receipt therefor, and transmit the same to the auditor. By this tax-book the sheriff and Auditor shall be governed in the collection and payment of the tax into the Treasury for that year, so far as it exhibits the amount thereof.

When assessor to return delinquents.

SECTION 6. The assessor, or his assistant, before he returns any one as a delinquent, shall apply at his residence for a list of his taxable property, and, in case of his absence, leave a written notice with some person of the household over sixteen years of age, or post on the front door of the residence, of the time and place such person shall meet the assessor in his county, and give in his list of taxable property; and if he fail to attend and give in such list, then the assessor shall report the person to the county court as delinquent.

Fine ag'st assessor for wrongful return of delinquent.

SECTION 7. If the assessor report any one as delinquent, under the above section, without having performed the duties required of him in said section, he shall be fined ten dollars, and he and his surety shall be liable by action upon his bond for damages to the Commonwealth, or any person injured.

Amount due assessor to be certified to auditor.

SECTION 8. The county court shall certify to the Auditor the amount due to the assessor for his services under this article, after he shall have completed his tax-book, and returned the same. The amount allowed shall not exceed fifteen cents for each person's list of taxable property, and the same shall be paid by the Treasurer, upon the warrant of the Auditor.

Oath to be taken by assessor.

SECTION 9. Before the county court shall grant such certificate of allowance, the assessor and his assistants, if any, shall take in open court the following oath: "I do swear that I have not received from any person a list of taxable property and returned the same until the person rendering the list had made oath to the truth of the same."

A deduction of fifty cents shall be made from the assessor's compensation for each list, he shall fail to report for taxation. Twenty per cent. of the allowance for services shall be retained by the Auditor until after the court of claims in the county of the assessor, on or before which time the sheriff shall report, on oath, to the county court, a list of all persons, with their taxable property, so far as known to him, who were omitted by the assessor. The report of the sheriff, so far as approved by the court, shall be certified to the auditor, who shall draw his warrant on the Treasury, in favor of the assessor for the amount due, after making the deductions aforesaid.

Deduction for failure to report.

Amount to be retained until accuracy of list ascertained

SECTION 10. The assessor and his assistants are authorized to administer the oaths required to be taken by persons whose property is required to be listed for taxation.

Assessor may administer oath to tax-payer.

SECTION 11. All taxable estate shall be valued as of the 10th day of January in the year listed; and the person owning or possessing the same on that day shall list it with the assessor, and remain bound for the tax, notwithstanding he may have sold or parted with the same.

Time at which valuation fixed; who liable for taxes.

SECTION 12. Persons listing their estate with the assessor shall state, separately, the tracts of land, the number of acres in each tract, the name of the nearest resident thereto, the value thereof, and where situated, giving the election precinct in which situated; the number of each town lot, in what town or city, and on which street situated, and the value of each; the number of horses, mares, mules jacks, and jennets, and their value; the number of cattle, and their value over fifty dollars; and also all other estate owned by them and subject to taxation, with the value thereof, on the 10th of January of the year in which the list is given.

Statement by tax-payer—what it shall show.

SECTION 13. The assessor, or his assistant, shall administer to every person listing property, the following oath before proceeding to list the property: "You do swear that the list of taxable property about to be given

Oath to be first administered—form of

in by you will contain a full and complete list, and the best description of the same you can give, of all and every species of property belonging to you, or in your possession, subject to taxation on the 10th of January last; and that no removal of property or omission has been made, or any method or device adopted or practiced, whereby to evade the payment of taxes by you; and that you will true and perfect answers make to such questions as may be asked you concerning your taxable property, or that of others in your possession, or about to be listed by you for them." If, in the opinion of the assessor or his assistant, there shall be an error in any list, it shall be his duty to note the same on the tax-book, so as to call the attention of the board of supervisors thereto.

Tax-payer to fix on oath am'nt worth from other sources.

SECTION 14. At the same time the assessor shall require the person referred to in the preceding section to fix, upon oath, a sum which will cover the amount he was worth on the 10th day of January, from all other sources, as provided for in the first article of this chapter.

Mercoants etc., to list goods, etc., on hand 1st of April.

SECTION 15. Merchants, manufacturers and grocers shall list the goods and groceries on hand on the first day of April in each year. They shall state, on oath, the full value thereof, exclusive of the articles manufactured in families within this State. The assessor shall call upon all merchants and grocers within his county or district, for their list of taxable property, between the first day of April and the first of May in each year.

Assessor to fix a full and fair value on all estate listed

SECTION 16. The assessor shall, from his own knowledge, and from the statements of the person listing property for taxation, and such other evidence as he may be able to obtain upon oath of witnesses sworn by him, fix a full and fair value upon all the estate listed with him for taxation, which is taxed according to its value, and enter the same, with the value thereof, in the order and manner prescribed in the tax-book, giving also the aggregate value.

Assessor's own estate to be listed with clerk.

SECTION 17. The assessor and his assistants, at the time of returning his tax-book, shall give in a list of their

taxable property to the county clerk, who shall administer the necessary oaths, and enter the list, with its value, in the tax-book, at the end thereof, attested by the clerk; and a failure or refusal to give in such list shall subject the assessor and his assistants, if any, to the same penalties and liabilities imposed upon other persons for the like offense. The clerk shall proceed, in the manner prescribed to the assessor, to obtain a list of said estate, and enter it upon the tax-book, and report to the county court the person refusing or failing, as delinquent. The assessor shall make and return, with his tax-book, a list of the names of all tavern-keepers, and retailers of ardent spirits, owners or keepers of stud-horses, jacks, and bulls, who have obtained a license under this chapter. The list to be returned shall be copied in the book returned to the Auditor.

List of tavern-keepers etc., to be returned by assessor.

SECTION 18. The assessor shall state in his tax-book, in the appropriate place, in full, the Christian and surnames of persons, and the proper name and title of things, and other information, designated in the form of the tax-book prescribed by law.

Full names of persons and things to be reported by assessor.

SECTION 19. The assessor shall make return, with his tax book, of the number of qualified voters resident in his county; and when a town or city within his county shall have a separate representation in either house of the General Assembly, he shall make a separate report of the qualified voters in such city or town.

Qualified voters to be returned.

SECTION 20. If any person fail or refuse to give a list of his taxable property, when legally called upon for that purpose by the assessor or his assistant, or give a false or fraudulent list, or refuse to give the amount he is worth, as required by the first article of this chapter, he shall be fined not exceeding one hundred dollars, and be subjected to the payment of three times the amount of the tax upon his estate, by the county court.

Penalty for failing to list or giving false list.

SECTION 21. The assessor, at the time he returns his tax-book, shall also return the names of all delinquents described in the preceding section, and shall, as to fraudulent delinquents, state in what the falsehood or fraud consists.

To return delinquents

Delinq'nts to be summoned and tried by co'ty courts

SECTION 22. The county clerk shall issue a summons in the name of the Commonwealth, in which shall be stated the offense, in general terms, against each of the delinquents, returnable to the next term of the county court, which shall hear and determine the case, upon giving to the defendant the right to have a jury to try the facts, if demanded before the trial is begun, which jury shall be composed of housekeepers, and summoned by the sheriff. If the defendant be found guilty, the court shall enter judgment for the fine, and triple tax and costs. The court shall fix the value of the taxable property upon which to impose the triple tax from their own knowledge, upon the statement of the defendant made upon oath, or upon such other evidence as it may be enabled to obtain; and execution shall issue for the fine, triple tax and costs. The fine and tax shall be certified by the clerk to the Auditor, and accounted for by the sheriff as other public moneys.

Delinquent not in wilful default permitted to list with clerk.

SECTION 23. The county court, before a judgment is rendered against a delinquent, may, if it is satisfied that the defendant was not willfully in default, direct its clerk to take the list of taxable property of such delinquent in the manner prescribed by law. The lists aforesaid shall forthwith be certified to the sheriff and Auditor, to be charged to the sheriff, and accounted for by him as other revenue. In such cases, the court may excuse the delinquent from the payment of the fine and triple tax upon payment of the costs of prosecution.

County attorney to prosecute.

SECTION 24. It shall be the duty of the county attorney to prosecute under the preceding section twenty-two, and if he does so, shall be allowed thirty per cent. of the fine for his services.

Sheriff to report persons failing to giv. in list.

SECTION 25. When it shall be known to the sheriff that any person has failed to give in a list of his taxable property in any year when it shall be liable to taxation, he shall report such person to the county clerk, to be dealt with, fined, and taxed as delinquents reported by the assessor. No sheriff or assessor shall be liable to cost in proceedings against delinquents reported by them.

Persons failing to list may do so with clerk.

SECTION 26. Any person, who has failed to give in his list of taxable property, because he was not called upon by the assessor, may, after the assessor has returned his tax-book, list the same with the county clerk at any time before the first day of October, who, on taking the same, shall be governed by the law regulating the duty of the assessor.

Tax-book to be in legible handwriting, columns added up, and aggregate stated.

SECTION 27. The assessor shall make out his tax-book in fair legible handwriting, in alphabetical order, add the amount of value of each column, aggregate thereof, and prove its accuracy, before he returns the same.

BOARD OF SUPERVISORS.

(GEN'L STATS. OF KY.. ART. 6, CHAP. 92, BULLITT AND FELAND'S GEN'L STATS. OF KY., 1881, PAGE 724.)

A Board of Supervisors to be appointed.

SECTION 1. The county court shall appoint three discreet tax-payers, citizens of the county, as a board of supervisors, who, or any two of them, shall, after being sworn, proceed to discharge their duties. They shall be allowed two dollars per day each for every day they may be necessarily employed, to be paid out of the Treasury. A copy of the order of appointment shall be made by the clerk, and delivered to each by the sheriff. They shall hold office one year, but may be reappointed.

Oath and *per diem* pay.

Term of office.

Duty of to hold session from two to six days.

SECTION 2. It shall be the duty of the board of supervisors to hold their sessions two days; and they may hold them six days.

To take proof of witnesses.

SECTION 3. They shall swear witnesses, reduce to writing the testimony of each witness examined before the board, which testimony shall be read to and subscribed by the witness, and returned to the county clerk, and preserved by him.

When to convene.

SECTION 4. They shall convene at the county clerk's office on the second Monday in May, in each year.

Duty to examine tax-books, correct errors of assessor, and fix proper value on property.

SECTION 5. It shall be the duty of said board to examine with care the tax-book, and to correct any errors of the assessor, whether in fact or in relation to the valuation of the property listed, and, in cases where they shall be of opinion that any of the property has not been correctly valued, to fix a proper value on the same.

Assessor to attend, and attendance of witnesses coerced.

SECTION 6. It shall be the duty of the assessor and his assistants, when required, to attend the sessions of said board, and give evidence and information, upon oath, concerning the business before them. And the said board shall have power to compel the attendance and examination of witnesses before them, to enable them to discharge their duties.

May receive tax-lists omitted, certify correction of tax-book and leave all with clerk.

SECTION 7. The board, during its sessions, may receive the tax list of any person omitted by the assessor, and enter the same in said tax-book. They shall keep a record of their proceedings, and correct the tax-book thereby. They shall annex their certificate that they have examined, corrected, and approved the tax-book, and leave it and their record with the clerk for safe-keeping.

Clerk to certify tax-book to the court, and send copy of order of approval to the auditor.

SECTION 8. The clerk shall certify to the county court the approval of the tax-book, and the county court shall enter the fact upon record. On the presentation of a copy of the order, the Auditor shall settle with the assessor, and pay him as is provided by law.

Board to report to county court omissions by assessor.

SECTION 9. The board of supervisors shall report to the county court the names of persons, liable to taxation, omitted by the assessor, by which report the county court shall be governed in their report of the delinquency of the assessor; and the county court shall also ascertain the amount of taxable property of all such persons, certify the same to the Auditor, and furnish the sheriff with a copy of such additional lists.

Tax-book, if not returned in time, must be, when complete, returned to clerk, and herein of his duties and punishment of assessor.

SECTION 10. If the assessor should not return his tax-book by the first day of May, the clerk may receive it from him when returned, and proceed to execute the duties required of him as though returned in time; and shall notify the members of the board of supervisors, who shall convene and perform the duties required of the board. The assessor, for such failure, shall be fined one hundred dollars.

AN ACT TO AMEND SECTION 6, ART. 6, CHAP. 92, OF THE GENERAL STATUTES.

(BULLITT AND FELAND'S GEN'L STATUTES OF KY., 1881, P. 1016.)

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. That section 6, article 6, chapter 92, of the General Statutes, be, and the same is hereby, amended by adding thereto the following words, to-wit: "but said board shall not change or alter the valuation of property, real or personal, as fixed by the assessor, without giving notice to the owner (or to his recognized agent, if he have one in the county), and said notice shall be served by any officer of the county authorized by law to serve summons, when the same is placed in his hands by any one of the supervisors; and said notice shall be served before any witness is examined concerning the true value of said property. From the decision of said Board, concerning the true value of said property, the owner (or his recognized agent) may, on motion, before the judge of the county court of said county, at its next regular term, have the question concerning the true value of said property tried by the said judge; and when the amount of taxes computed or to be computed on said property exceeds fifty dollars, the owner (or his recognized agent) shall, on motion, be granted an appeal to the circuit court of the said county. When a copy of the decision of the said county judge is filed with the clerk of the circuit court of said county, it shall be his duty to docket the same as in other appeals from the county courts, justices' courts, etc. It shall be the duty of the county attorney to attend to all such cases in both the county and circuit courts in behalf of the county. If the owner of said property (or his recognized agent) fail to reduce in the circuit court the value of said property as fixed by the county court, then the

Appeal from co'nty to circuit court.

County attorney's duty.

said owner (or his recognized agent) shall pay the costs of said appeal.

SECTION 2. This act shall take effect from and after its passage, and shall apply to cases now pending in any county court in this Commonwealth.

Approved April 2, 1878.

DUTIES OF THE CIRCUIT AND COUNTY COURT CLERKS IN RELATION TO THE REVENUE.

(GEN'L STATUTES OF KY., ART. VII, CHAP. 92, BULLITT AND FELAND'S GEN'L STATUTES KY., 1881 P. 725.)

Assessor's book to be copied by clerk—one for sheriff and one for auditor.

He must test the accuracy of footing up, etc.

Transmit to auditor by July 1st.

SECTION 1. The clerk of the county court, after the examination and approval of the tax-book, shall make two copies thereof—one for the sheriff and the other for the Auditor. He shall test the accuracy of the extensions and additions of said book, make additions of each column, and the aggregate amount, and copy on each page the same amount of matter, and no more, than is upon the original tax-book. He shall deliver the copy to the sheriff, on or before the first day of June, and take his receipt therefor; which, together with the other copy, he shall transmit by mail or otherwise to the Auditor, by the first day of July in each year.

Improper assessment may be inquired into by the county court

SECTION 2. A person improperly charged with any tax or county levy, before he has paid the same, may make proof thereof to the county court in which the assessment was made, and the court may correct the same. A certificate of the fact by the clerk, if delivered to the sheriff, shall exonerate the person from the payment of so much as may be decided to be a wrongful assessment; which certificate, if produced, shall entitle the sheriff to a credit for the amount in his settlement with the Auditor.

Taxes twice paid—how refunded.

SECTION 3. If taxes have been twice paid upon land under the same title, in the same year, upon proof thereof before the county court of the county in which the last payment was made, within twelve months after such payment, such court may order the tax to be refunded to the applicant by the sheriff, if not paid into the Treasury; and if so paid, to be refunded by the Treasurer upon the warrant of the Auditor.

Oath of sheriff as to delinquent list, and duty of court to examine same

SECTION 4. The county court, before allowing and certifying any delinquent list, upon the application of the sheriff, shall administer to the sheriff and his deputies the following oath: "You do swear that this list of insolvents and delinquents, now before the court, and returned by you, is just and true, as you believe, according to the knowledge which you have; and that you will true answers make to all questions asked you touching said lists, and the efforts made by you to collect the amount thereof." The court shall then proceed to examine the sheriff, to ascertain the truth of the facts, and upon such answers and other evidence, and their own knowledge, to allow such portions of the lists as may be right which being certified as allowed, shall entitle the sheriff to a credit in his official settlement.

AN ACT TO AMEND THE REVENUE LAWS OF THE COMMONWEALTH OF KENTUCKY.

(BULLITT AND FELAND'S GEN'L STATS. OF KY., 1881, P. 1022.)

SECTION 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That whenever a person shall, in pursuance of section 2, of article 7, of chapter 92, of the General Statutes, make an application to a county court to have a charge of tax or county levy against him corrected, it shall be the duty of such court, upon proof being heard, to make an order correcting or refusing to correct the same; and if more than fifty dollars be involved in such controversy, exclusive of interest and cost, an appeal may be prosecuted by such person to the circuit court of the county in which the assessment was made. Such appeal shall be taken and prosecuted in the same time, and in the same way and manner, as is required by law in reference to appeals from the judgments of quarterly courts to circuit courts. No bill of exceptions shall be required in the county court, and the cause shall be tried anew in the circuit court.

Right of appeal from order of co'nty court refusing to correct assessment.

SECTION 2. This act shall be in force from its passage.

Approved April 10, 1878.

REVENUE AND TAXATION.

ARTICLE XII.

RAILROADS, TURNPIKE ROADS, AND OTHER CORPORATIONS, TAX ON.

(GEN'L STATS. OF KY., ART. 12, CHAP. 92, BULLITT AND FELAND'S GEN'L STATS. OF KY., 1881, P. 744.)

How railroads taxed and how collected.

Amended, p. 1019, 1026-7.

SECTION 1. The several railroads in this Commonwealth, their depot grounds and improvements, with the right of way, engines, rolling stock, and other investments for the uses and purposes of the roads, are hereby assessed for taxation at the rate of twenty thousand dollars per mile, except roads known as narrow-guage roads, which shall be assessed at ten thousand dollars per mile. The presidents and directors of each road shall, annually, on or before the tenth day of July, return, under oath, to the Auditor of Public Accounts, a statement of the length of the road, and branches belonging to them, and pay to the Treasurer, on or before the 10th day of October in each year, the same rate of tax on the assessment as is levied by law on real estate.

Turnpike roads—how taxed and how collected.

SECTION 2. The several turnpike roads in this Commonwealth paying dividends are hereby assessed for taxation at the rate of six per centum per annum, upon the net dividends of said roads, to be ascertained by the treasurers or presidents of said roads, and reported, on oath, to the Auditor by the 10th day of July in each year; and when the net dividend shall be so ascertained, the tax shall be paid into the Treasury by one of the officers aforesaid, by the 10th day of October in each year.

Toll-bridge mining, etc. company, owning property, must report statem't of all property itemized, and value of each species

SECTION 3. It shall be the duty of the president, treasurer, secretary, mayor, agent, or other person representing, or doing business for any toll-bridge company, incorporated city, mining or manufacturing company or association, or any street-railroad company owning property in this State, to report, under oath, to the Auditor of Public Accounts, on or before the 10th day of July every year, a

full and complete statement of all property owned, possessed, held, or represented, by the company, city, or association, of which he is president, treasurer, secretary, mayor, agent, or representative, including bridges, machine shops, warehouses, engines, tools, implements, lands, city or town lots, with improvements thereon, or contained therein, stocks, bonds, or other securities, cash on hand, accumulated, or surplus fund, and any other property owned, possessed, held, or represented, by them, showing the total cash value of every species of property.

Gas and water company to report in full all property and total cash value.

SECTION 4. It shall be the duty of the president, treasurer, or secretary of any gas or water company or association, in this State to report, under oath, to the Auditor of Public Accounts, on or before the 10th day of July every year, a full and complete statement of all property, real, personal, or mixed, including buildings, engines, machinery, pipes, above and below ground reservoirs, retorts, tanks, meters, lamp-posts, together with any and all other species of property connected with or in any way belonging to or under the control of such gas or water company, and any surplus accumulated, or contingent fund on hand, cash on hand, stocks, bonds, or other securities, and the total cash value thereof.

Tax on bridge, mining, manufacturing, etc., companies, property of, how taxed.

SECTION 5. It shall be the duty of the president, treasurer, secretary, mayor, or agent, of any toll-bridge company, incorporated city, mining, or other incorporated or manufacturing company, gas or water company or association, in or doing business in this State, under or by virtue of any act of incorporation named in this article, to pay into the Treasury, on or before the 10th day of October in each year, a tax upon each one hundred dollars of the value of the property owned, possessed, held, or represented, by such company, city, or association, equivalent to the tax collected upon real estate.

Telegraph companies taxed 50cts. per mile.

SECTION 6. It shall be the duty of the president, treasurer, secretary, or manager of any telegraph company or association, working, operating, or controlling any telegraph line in this State, to report, under oath, to the Au-

ditor of Public Accounts, on or before the 10th day of July every year, a full and complete statement of each line, and the whole number of miles of wire worked, or under their control and management in this State; and shall also pay into the Treasury, on or before the 10th day of October in each year, a tax equal to fifty cents on each mile of wire.

Penalties on officers of companies who fail to comply with the provisions of this article.

SECTION 7. Any president, treasurer, secretary, mayor, agent, or other person, failing or refusing to comply with any of the provisions of this article, shall be fined a sum not less than two hundred nor more than five hundred dollars, to be recovered by motion in the Franklin circuit court; but this article shall not apply to any property, or corporation specifically exempt from taxation.

Individual shares of stock not to be listed for taxation.

SECTION 8. That the individual stockholders of the companies which are by this article required to report and pay tax upon the value of their property, shall not be required to list their shares in such companies for taxation.

Liability of officers refusing or failing to report to auditor.

SECTION 9. If any of the officers, mentioned in this article, shall fail or refuse to report to the Auditor of Public Accounts, as therein required, such officer shall be liable to a fine of one thousand dollars for each month he may so fail to report; which fine or fines shall be recoverable upon motion in the name of the Commonwealth in the Franklin circuit court; and any execution which may issue upon any judgment rendered on such motion may be levied on the property of any corporation in whose employment such officer may be; but before any such judgment shall be rendered, said officer shall have at least twenty days' notice of the motion.

Revenue proper.

SECTION 10. All money paid into the Treasury under this article shall be for the ordinary expenses of the government.

All reports to refer to Jan'y 10th.

SECTION 11. The 10th day of January in each year shall be the time to which all reports required by this article shall refer, unless as otherwise provided.

CITATION OF AUTHORITIES.

STATUTES OF KENTUCKY TAXING THE PROPERTY OF RAILROADS.

Act of April 3d, 1878, Bullitt and Feland's Gen'l Statutes of Ky., 1883, p. 1019.

Act of April 6th, 1882, Gen'l Laws of Ky., Session Acts, 1882, Vol. I, p. 66.

Act of April 19th, 1882, Gen'l Laws of Ky., Session Acts, 1882, Vol. I, p. 99.

Report of R. R. Commissioners of Ky., 1881, p. 129.

STATUTES OF KENTUCKY ASSESSING PROPERTY OTHER THAN RAILROADS.

Gen'l Statutes of Ky., Art. 5, Chap. 92, Secs. 12, 13, 14, 15, 16, 6, 22.

Gen'l Statutes of Ky., Art. 6, Chap. 92, and Amendment by Act of April 2d, 1878, Bullitt and Feland's Gen'l Statutes of Ky., 1883, p. 1016.

Gen'l Statutes of Ky., Art. 7, Ch. 92, Sec. 2.

Gen'l Statutes of Ky., Art. 12, Ch. 92, Secs. 2, 3, 4 and 5.

POWER OF JUDICIARY TO PROTECT AGAINST UNEQUAL AND UNCONSTITUTIONAL TAXATION.

Blackwell on Tax Titles, Sec. 106; *Cooley on Taxation*, p. 259, and cases cited; *L. & N. R. R. Co.* v. *Commonwealth*, 1 Bush., 250; *State Tax on Foreign-held Bonds*, 15 Wall., 319; *Opinion of Justice Field in San Mateo Tax Cases*, 8 Am. and Eng. Ry. Cases, p. 10; *Howell* v. *Bristol*, 8 Bush., 499; *Lexington* v. *McQuillan's Heirs*, 9 Dana, 516, 517; *Ward* v. *Maryland*, 12 Wallace, 430.

STATE TAXATION EMBRACED BY 14th AMENDMENT OF FEDERAL CONSTITUTION.

Cons. U. S., Amendments, Art. XIV, Sec. 1.

Justice Field's Opinion in San Mateo Tax Cases, 8 Am. and Eng. Ry. Cases, p. 11.

See also, Civil Rights Bill of May 31st, 1870, and R. S. U. S., Sec. 1977; *Poindexter* v. *Greenhow*, 114 U. S., 270, 335, 336, 297.

CORPORATIONS AND CORPORATE PROPERTY ARE WITHIN THE PROTECTION OF THE 14th AMENDMENT.

City of Louisville v. *Commonwealth*, 1 Duval, 295; *L. & N. R. R. Co.* v. *Commonwealth*, 1 Bush., 253; *Rajalge and Lawrence's Law Dist.*, Vol. 2, p. 954; *Morawetz on Private Corporations*, Sec. 457, and authorities cited; *Marshall* v. *B. & O. R. R. Co.*, 16 Howard, 327; *Sinking Fund Cases*, 99 U. S., 718, 737; *Slaughter-house Cases*, 16 Wall., 36; *Butchers Union Co.* v. *Crescent City Co.*, 111 U. S., 746.

See, also, *Davidson* v. *New Orleans*, 96 U. S., 97; *Hurtado* v. *California*, 110 U. S., 516; *Hagar* v. *Reclamation District*, 111 U. S., 701; *Foster* v. *Kansas*, 112 U. S., 201; *Kennard* v. *Louisiana*, 92 U. S., 480; *Chicago Life Insurance Co.* v. *Needles*, 113 U. S., 574; *Dartmouth College Case*, 4 Wheat., 518.

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Stuart v. *Palmer*, 74 N. Y., 183, 191.

Patten v. *Green*, 13 Cal., 325.

Cooper v. *Board of Works*, 108 Eng. Com. Law R., 180.

Mulligan v. *Smith*, 59 Calif., 231, 243.

Kansas Pacific R. R. Co. v. *Russell*, 8 Kan., 558.

Cooley on Taxation, 266.

State Railroad Tax Cases, 2 Otto, 575.

See Statutes of Ky. relating to property other than railroads, and providing for such notice.

Gen'l Statutes of Ky., Art. 5, Ch. 92, Secs. 6, 22 and 23.

Gen'l Statutes of Ky., Art. 6, Ch. 92, Sec. 16.

Gen'l Statutes of Ky., Art. 7, Ch. 92, Sec. 2.

Gen'l Statutes of Ky., Art. 12, Ch. 92, Secs. 2, 3, 4, and 5.

Act of April 2d, 1878, Bullitt and Feland's Gen'l Statutes of Ky., p. 1016.

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McQuillan's Case, 9 Dana, 513, 516.

Howell v. *Bristol*, 8 Bush., 498.

Constitution of Ky., Sec. 3, Art. 13.

Barbour v. *Board of Trade*, Ky. Law Rep., Vol. VI, p. 773; *Cooley on Const. Lim.*, p. 624; *Exchange Bank of Columbus* v. *Hines*, 3 Ohio St., 15; *Cummings* v. *National Bank*, 101 U. S., 158.

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CITATION OF AUTHORITIES.

115-321

Supreme Court of the United States,

OCTOBER TERM, 1885.

The Cin'ti, New Orleans and Texas Pacific R. R. Co.,
Plaintiff in Error.
vs.
The Commonwealth of Kentucky,
Defendant in Error.
No. 497.

The Louisville and Nashville R. R. Co.,
Plaintiff in Error.
vs.
The Commonwealth of Kentucky,
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The Chesapeake, Ohio and South-western R. R. Co.,
Plaintiff in Error.
vs.
The Commonwealth of Kentucky,
Defendant in Error.
No. 499.

In Error to the Court of Appeals of the Commonwealth of Kentucky.

ARGUMENT FOR PLAINTIFFS IN ERROR, BY

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ARGUMENT FOR PLAINTIFFS IN ERROR.

The questions involved in these causes arise upon a statute passed by the General Assembly of Kentucky, approved April 3rd, 1878, entitled "An act to prescribe the mode of ascertaining the value of the property of railroad companies for taxation, and for taxing same," which act, it is claimed, is a violation of the 14th Amendment of the Federal Constitution, in that it denies to owners of railroad property, the equal protection of the law, and deprives them of their pro-

perty, without due process of law. This act of the Legislature is to be found on page 1019 of the General Statutes of Kentucky, but for the sake of convenience to the Court we have printed the act in full, together with other statutes referred to, as an addenda to our joint brief.

Under the provisions of the law, taxing railroads, it is made the duty of the,

President or chief officer of the railroad, to return to the Auditor of Public Accounts, in the month of July in each year, the total length of such railroad, including the length thereof beyond the limits of the state, and in each county, city, and incorporated town therein, together with the average value per mile thereof, for the purpose of being operated as a carrier of freight and passengers, including engines and cars, and a list of the depot grounds and improvements, and other real estate of the said company, and the value thereof, and the respective counties, cities, and incorporated towns in which the same are located. *Sec.* 1. (*See joint brief page* 41.)

It will be noticed, that railroad property listed for taxation, as returned by its chief officer, is separated into two classes, each class being the subject of a distinct valuation.

First, the line of railroad is to be valued upon the basis of its value for the purpose of being operated as a carrier of freight and passengers.

Secondly, the depot grounds, improvements, and other real estate of the company are to be specifically itemized, located and valued.

It is important that these separate and distinct valuations should be observed and remembered, when we come to consider this law in relation to, and in connection with, other laws providing for the assessing of other real estate, belonging, not to railroads, but to the private citizen. By the provisions of the law now under consideration, the depot grounds, improve-

ments and other real estate, belonging to railroads, preserve their individuality (if we may so term it) as much as the farms, business houses, and dwellings of the citizen, that is, for the purposes of taxation, such property is considered separate and apart from the line of the railway to which it is annexed, and is made the subject of a special valuation or assessment.

After the returns are received by the Auditor of Public Accounts, and not until then, do the duties of the Board of Equalization begin.

They are required to meet annually, at the office of the Auditor, on the first day of September each year, at which meeting the Auditor is required to lay before them the returns received by him from the different railroads.

"and should the valuations, or any of them, in the judgment of said Board, be either too high or too low, they shall correct and equalize the same by a proper increase or decrease thereof." (*See joint brief, page* 42.)

It is important to understand at the very outset of this argument, the status of railroad property in Kentucky in relation to its taxable character.

The law taxing this class of property provides that:

"The same rate of taxation for State purposes, which is or may be in any year levied on other real estate in this Commonwealth, shall be, and is hereby, levied upon the value so found by said Board, of the railroad, rolling stock, and real estate of each company; and the same rate for taxation for the purposes of each county, city, town or precinct, in which any portion of any railroad is located, which is or may be in any year levied upon other real estate therein, shall be, and is hereby, levied on the value of the real estate of said company therein, and of the number of miles of such road therein, reckoned as of the value of the average value of each mile of such railroad with its rolling stock, as ascertained as aforesaid." *Sec.* 4 *of Act of April* 3, 1878. (*See joint brief, p.* 43.)

The Court of Appeals of Kentucky, in construing this law, says:

"A railroad must necessarily be regarded as a unit, and as this court has determined, by reason of legislative authority, must be taxed as such. Its rolling stock cannot be seized and subjected for taxes assessed for municipal purposes, nor are railroads listed by the assessors of the counties through which they may pass for taxation. All of the locomotives, cars, etc., are treated as fixtures, and there is no better or more practical mode of assessing such property than to treat the whole as real estate." *C., N. O. & T. P. Ry.* v. *Commonwealth*, 81 Ky. p. 503. (*See record, case No.* 497, *p.* 16.)

This was but the confirming of the principle announced by the same court in the case of *Copeland* v. *Copeland*, 7 Bush., 350, that the right of way of a railroad, with its substructure of wood and iron fixtures, etc., belongs essentially to the classification of real estate.

Thus by legislative enactment, construed and sanctioned by the court of last resort in Kentucky, the property of railroads for purposes of taxation is classed as, and held to be, real estate.

How is the real estate, property of the private citizen, assessed for taxation in the State of Kentucky?

What, if any, protection is given such citizen as against the ignorance or willful misconduct of the assessor?

What rights and remedies have such citizens secured, by law to them, against the ignorant judgment, or willful misjudgment of assessors or boards of equalization, in fixing the valuation of their property for taxation?

What similiar protection, rights or remedies, if any, are given by law to the owners of railroad property, against the ignorance or willful misconduct of the assessors of their real estate?

These are the questions submitted for consideration in

this case, upon their solution the rights of these plaintiffs in error, their constitutional rights to the equal protection of the law, depend.

An examination of the revenue laws of Kentucky will show that the denial of the equal protection of the law complained of, is this:

First. The law denies to the railroad companies the right to value their own property for taxation, but requires that such property shall be valued by a person designated by the Legislature, without regard to his fitness or qualification.

Second. If this, designated, official fails to make the valuation which the law requires of him, the railroad company is treated as delinquent. In which event the law requires that the property of the railroad shall be valued for taxation by a *state official;* the Auditor of State, who has no connection with the railroad; has no knowledge of the character or value of the property to be assessed; and who is not required to make an examination of it, or receive evidence concerning its value.

Third. The Board of Equalization may change and increase the valuation of railroad property to any amount within its discretion.

Without notice to the owner of the property.

Without any examination of the property for the purpose of ascertaining its true value.

Without hearing any evidence as to the true value of the property to be assessed.

Without any knowledge of the condition or character of the property to be assessed.

Fourth. There is given to the railroad property holder:

No right of notice of proposed increased assessment.

No right of hearing before the Board of Equalization.

No right of offering testimony to show true value of property.

No right of appeal from unjust or erroneous valuation.

Upon the other hand, the owner of private property is by law secured:

First. The right to value his own property under oath, which valuation the assessor cannot alter, except upon sworn evidence of its incorrectness, supported by his own *personal knowledge* of the property valued.

Second. The right to appeal from the decision of the assessor, increasing the valuation of his property, to a Board of Supervisors; from the decision of the Board of Supervisors, to the County Court; from the decision of the County Court to the Circuit Court; with the right, in relation to the value of his property for taxation, to produce evidence, and cross-examine witnesses before the Board of Supervisors, and in County and Circuit Courts; to have the testimony of such witnesses reduced to writing, read to, and subscribed by the witnesses, and preserved.

Third. If, for good reason, the property owner should fail to list and value his property with the assessor, the law forbids the assessor returning any value upon the same, but permits the delinquent property owner to go before the County Court and have his property valued upon testimony of witnesses.

Fourth. The private property owner is secured against an increased assessment of his property by the Board of Supervisors, until he *has been served with a notice, by an official authorized by law to serve summons, notifying him that the Board of Supervisors is contemplating the increasing of his assessment;* after which notice he is secured the right of producing witnesses

before the Board of Supervisors, of appealing from their decision to the County Court, and from the County Court to the Circuit Court, and having the question of the valuation of his property tried upon each appeal, upon hearing and evidence.

A simple comparison of the statutes, providing for the assessment of the real estate of the private citizen, with the statutes assessing the real estate belonging to railroads, will be sufficient to demonstrate, that every safe-guard and protection, which the ingenuity and wisdom of legislators could conceive, is thrown around the first and refused to the second. That the first is the favorite of legislation, surrounded and protected by an impassible bulwark of positive enactments; while the other, the one which contributes most largely to the development of the wealth of the state, is left helpless, dependent upon the mercy, or want of mercy, of an irresponsible board of assessors.

Before we proceed to this examination and comparison of the Statutes of Kentucky, two preliminary questions arise, which may be stated:

ARE CORPORATIONS PERSONS WITHIN THE PURVIEW OF THE FIRST SECTION OF THE 14TH AMENDMENT OF THE FEDERAL CONSTITUTION, WHICH GUARANTEES TO EVERY PERSON THE EQUAL PROTECTION OF THE LAW?

WHAT IS MEANT BY THE TERM "EQUAL PROTECTION OF THE LAW?"

This Court, by a long line of well considered adjudications, has held that a corporation is a person subject to the law, and entitled to the privileges and protection of the law.

It is true, that in the cases of the *Bank of Augusta* v. *Earle*, 13 Peters, 519, and *Paul* v. *Virginia*, 8 Wallace, 168, it was held, that corporations were not *citizens* within the meaning of

Sec. 2, Art. 4 of the Federal Constitution, which provides that, "The citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states," because, abstractly considered, corporations being the creation of legislative enactment, receiving life only from legislative will, being entirely dependent upon that will for continued existence, corporations could only have a legal entity in the state in which they were created, *a fortiori*, they were without power of migration, and being without power of migration, they could not claim in other states any rights or privileges except such as were accorded to them through courtesy, which courtesy might prescribe the limitations and conditions of its acceptance; that having accepted such terms and conditions, no greater or higher privileges could be demanded. To hold otherwise, as was said by Mr. Justice Field in *Paul* v. *Virginia*, would be to make the laws of one state operative in other states.

But in every case which required the enforcement of the obligations of a contract, or the protection of the rights of property, this court has looked beyond the shell of the corporate name, to the persons and individuals represented by that name, and has accorded to them the full protection of the law as natural persons.

As early as 1809, in the case of the *Bank of United States* v. *Deveaux et al.*, 5 Cranch, 62, Chief-Justice Marshall, in holding that a corporation aggregate composed of citizens of one state, may sue a citizen of another state in the United States Court, says:

"The court feels itself authorized, on questions of jurisdiction, to look to the character of the individuals who compose the corporation."

In the case of *The Providence Bank* v. *Billings, et al.* 4

Peters, 562, where the bank sought to escape taxation upon the ground that the act taxing the bank was repugnant to the Constitution of the United States, in that it impaired the obligations of the contract created by the charter of incorporation, the same great jurist, after first finding that under the charter there was no exemption from taxation, says:

"The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. Any privileges which may exempt it from the burthens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist."

If the uniting or coalescing of the individual responsibilities of the share-holders into one individuality, that of the corporation, does not relieve the corporation of the burden and responsibilities which attached to the share-holders, the uniting or coalescing of the personal rights of the share-holders into one individuality, that of the corporation, should not deprive such share-holder of that just protection of the law which is accorded to the common individual.

This would be but the recognition of the principle stated in the case of *United States* v. *Amedy*, 11 Wheaton, 393, where, under the Crimes Act of March 26, 1804, providing for the punishment of any person that should destroy a vessel with the intention to injure any *person* or *persons* that had underwritten the same; this court held—Mr. Justice Story delivering the opinion—that

"The terms 'any person or persons' in the act, extend to corporations and bodies politic, as well as to natural persons."

In extending the protection of the law in that case to corporations as persons, the learned Justice says:

"Another question, not raised in the court below, has

been argued here, and upon which, as it is vital to the prosecution, we feel ourselves called upon to express an opinion. It is that a corporation is not a person within the meaning of the act of Congress. If there had been any settled course of decisions on this subject, in criminal cases, we should certainly, in a prosecution of this nature, yield to such construction of the act. But there is no such course of decisions. The mischief intended to be reached by the statute is the same, whether it respects private or corporate persons. That corporations are, in law, for civil purposes, deemed persons is unquestionable. And the citation from 2 Inst., 736, establishes that they are so deemed within the purview of penal statutes. Lord Coke, there, in commenting on the statute of 31 Eliz., Ch. 7, respecting the erection of cottages, where the word used is, 'no person shall,' etc., says, 'This extends as well to persons politic and incorporate as to natural persons whatsoever.'"

Under the act of March 3rd, 1797, making a debt due the United States a prior claim against the insolvent estate of any *person* indebted to the United States; this court has held, that a claim of the United States against a corporation was, under the statute, a claim against a *person*, which secured to the United States a priority of payment. In other words, that under the statute of March 3, 1797, a corporation must be regarded as a person.

The statutes giving priority to the claims of the United States provided:

"That when any revenue officer, or *other person* hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent," etc. *Beaston* v. *The Farmers' Bank of Delaware*, 12 Peters, 102.

The context, associating the "other person" mentioned in the statute with revenue officers, would seem to indicate that the term person was intended to apply only to a natural person, but the court held otherwise, *i. e.*, that it applied to corporations as well as to natural persons.

It was held that the property of British corporations in this country was protected by the 6th article of the Treaty of

Peace of 1783, in the same manner as those of natural persons.

The language of the treaty was:

"There shall be no future confiscations made, nor any prosecutions commenced against any person or persons, for or by reason of the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any loss or damage, either in his person, liberty, or property." *The Society for the Propagation of the Gospel in Foreign Parts* v. *The Town of New Haven*, 8 Wheaton, 489.

Mr. Webster, contended that English corporations were not included in the protective clause of the treaty, and that their property was subject to confiscation, but this court, speaking through Mr. Justice Washington, refused to sanction such a hard and unjust construction.

It was held in case of *National Bank* v. *Graham*, 100 U. S., p. 699, that a corporation may be sued for assault and battery, for fraud and deceit, for false imprisonment, for nuisance, for libel.

In the well considered case of the *Louisville, Cincinnati & Charleston R. R. Co.* v. *Letson*, 2 Howard, 497, when the question of the right of a corporation to sue a citizen of another state, in the United States Court, was determined, Mr. Justice Wayne, in reply to the argument that a corporation possessed no rights as a citizen, to sue in the United States Courts; after stating that jurisdiction in cases of corporations exist by virtue of the character of its members, and must be maintained in the courts of the United States, unless citizens can exempt themselves from their constitutional liability to be sued in those courts, by the citizens of another state, by the fact that the subject of the controversy between them has arisen upon a contract, to which the former are parties in their corporate and not in their personal character, thus emphatically states the law:

"Constitutional rights and liabilities can not be so taken away or avoided."

Following this, in the case of *Marshall* v. *Balt. & Ohio R. R.*, 16 Howard, 314, Mr. Justice Grier says:

"The constitutional privilege which the citizens of one state has to sue the citizens of another state in the Federal Courts cannot be taken away by the erection of the latter into a corporation, by the laws of the state in which they live. The corporation itself may therefore be sued as such."

The reasoning of the learned Judge, from which the conclusion followed, was this:

"A corporation, it is said, is an artificial person, a mere legal entity invisible and intangible. This is no doubt metaphysically true in a certain sense. The inference, also, that such an artificial entity cannot be a citizen, is a logical conclusion from the premise which cannot be denied.

But a citizen who has made a contract and has 'a controversy,' with a corporation, may also say, with equal truth, that he did not deal with a mere metaphysical abstraction, but with natural persons; that his suit has not been served on an imaginary entity, but on men and citizens; and that his contract was made with them as the legal representatives of numerous unknown associates, or secret and dormant partners."

We do not consider further citation of analagous cases necessary. We have found that by the construction given by this Court to the Crimes Act of 1804;

By the construction of statute of 1797, securing to the United States the priority of payment from an insolvent debtor's estate.

By the construction of a treaty of peace.

By construction of the act of Congress ~~confirming~~ conferring jurisdiction upon United States Courts; this court has, uniformly, held that corporations are subject to the same obligations, and entitled to the same protection of the law that natural persons are.

That when the law provides either for the punishment of crime, the protection of a right, or the enforcement of an obligation, that a corporation is included and embraced in the word person.

The principle settled in *Paul* v. *Virginia*, is not antagonistic to this view, for says Mr. Justice Fields, in the Slaughter House Case:

"The whole purport of the decision, (*Paul* v. *Virginia*) was that the citizens of one State do not carry with them into another State any special previliges or immunities conferred by the law of their own State, of a corporate or other character."

Nor does the decision in the celebrated Slaughter House Case decide the case, that corporations are not persons within the purview of the 14th Amendment.

The decision of the majority of the court, in that case, rested upon a construction given to the section of the amendment; guaranteeing the privileges and immunities of citizens of the United States, in contra-distinction to citizens of the several states; and holding that the amendment could not be construed as a protection of a citizen as against the legislative power of his own State. The question of the equal protection of the law was treated by the majority of the court as a subordinate question; and while Mr. Justice Miller states that the 14th and 15th Amendments were addressed to the grievances of the negro race, in immediately the same connection, he says:

"We do not say that none else but the negro can share this protection. Both the language and the spirit of these articles are to have their fair and just weight in any question of construction."

The majority of the court then found, not that the plaintiffs in error would not have been entitled to relief had the

facts justified it, but that there was "no State oppression by a denial of equal justice in its courts."

The opinion of the dissenting minority, representing the Chief Justice, and Justices Field, Swayne and Bradley, (certainly a most respectable minority,) held in unequivocal language, that the plaintiffs in error were entitled to the protection claimed under the 14th Amendment, in that they were denied the equal protection of the law, and *a fortiori*, that although corporations, they were persons within the purview of the Amendment.

The precise point, contended for, has been decided by Mr. Justice Field in the San Mateo case, 13 Fed. Rep. 722; which case is, so familiar to the court, from recent and exhaustive citation and argument, that we do not deem it necessary to take up time for quotations, which otherwise its clear and lucid reasoning, and exhaustive research, would demand; suffice to say, that the principles of law there enunciated seem so logically correct, and so supported by authority, that they have, and must, remain unanswered and unanswerable.

Twice cases presenting the point at issue has received the consideration of this court, although the point was not raised, or passed upon by the court.

The first was the case of *Richmond and Fredricksburg R. R.* v. *the City of Richmoud*, 96 U. S., 521.

Where it was contended, that an ordinance, of the city of Richmond, prohibiting the use of engines of the railroad on Broad street in said city, impaired the vested rights of the company under its charter, deprived it of its property without due process of law, and denied to the company an equal protection of the law. The case was decided by the Chief Justice, who found against the company upon all three of the points made.

The second case:

The Chicago Life Ins. Co. v. *Needles*, 113 U. S., 574, arose upon a claim made by a corporation which was enjoined from carrying on its business in the State of Illinois, under a law, which provided, that when the actual funds of any life insurance company doing business in the State, were not of a net equal value, to the net value of its policies, with interest at four per centum per annum, that upon application, of the Auditor of State, any Circuit Court in the State, should issue an injunction restraining the company from further proceeding with its business. It was claimed, by the company corporation, that the law was a violation of its vested corporate rights; deprived the company of its property without due process of law; and denied it the equal protection of the law.

This Court, through Mr. Justice Harlan, decided that the statute complained of did not violate any of the constitutional rights of the plaintiff in error, and affirmed the court below.

In both of the cases last cited, this Court passed upon questions raised by corporations under the clause of the Fourteenth Amendment, guaranteeing the equal protection of the law; and assumed thereby the rights of corporations to the protection of that amendment. We might be justified, in relying upon these cases as settling the principle contended for, were it not, that an examination of the cases do not show that the precise point was raised, nor that the court, in terms, pass upon the point; we feel, therefore, that we would not be justified, in treating as *res adjudicata* a matter, upon which the court has only passed by implication; especially when the point raised is so important as to involve the construction of the Federal Constitution, and the determining of a constitutional right. While, therefore, these cases may not be accepted as finally settling the principle contended for,

we assert, they should be entitled to great weight as evidencing the policy and intention of this Court in the construction of the 14th Amendment in relation to corporate rights.

As was said by Chief Justice Marshall, in the case of *The Bank of the United States* v. *Deveaux*, 5 Cranch, 61, when the *first time* the right of corporations to sue citizens of another State in the United States Court, was raised and questioned.

"Repeatedly has this court decided causes between a corporation and an individual without a feeling of doubt respecting its jurisdiction. Those decisions are not cited as authority; for they were made without considering this particular point; but they have much weight, as they show that this point neither occurred to the bar or the bench; and that common understanding of intelligent men is in favor of the rights of incorporated aliens, or citizens of the different States from the defendant, to sue in the National Courts."

The point we insist upon, *i. e.* that corporations are persons within the purview of the 1st section of the 14th Amendment, was vigorously resisted in the San Mateo case, and will be, we know, as vigorously resisted by our learned opponents in these causes. We feel that we are justly entitled to all the weight of the fact, that this Court has twice decided cases in which the same principle might have been raised, without questioning the right of the corporations to the protection which they now seek.

Chief Justice Marshall, says in the case of *Marten* v. *Hunter's Lessees*, 1 Wheaton, 326.

"The constitution unavoidably deals in general language. It did not suit the purposes of the people, in framing this great charter of our liberties, to provide for minute specifications of its powers, or declare the means by which these powers should be carried into execution. It was foreseen that this would be a perilous and difficult, if not impracticable, task. The instrument was not intended to provide merely for the exigencies of a few years, but to endure through the long

lapse of ages, the events which were locked up in the inscrutable purposes of Providence. It could not be foreseen what new changes and modifications of power might be indispensable to effectuate the general objects of the charter; and restrictions and specifications which, at the present time might seem salutary, might, in the end, prove the overthrow of the system itself."

Mr. Justice Miller, in the case of *Woodson* v. *Murdock*, 22 Wallace, 351, says:

"But of what avail are constitutional restrictions of legislative power, or legislative restrictions of municipal power, if they are disregarded by the legislatures and municipalities? It may be said that there remains to the people the protection of the courts. But language is at best but a very imperfect instrument in expression of thought, and the fundamental principles of government found in constitutions must necessarily be declared in terms very general, because they must be very comprehensive."

We will not attempt a recitation of the arbitary rules which are sometimes said to govern the construction of statutes and constitutional provisions, but which an eminent writer says "savor rather of the closet than of practical life."

Chief Justice Parker, of Massachusetts, in construing constitutional provisions, has said:

"We are to suppose that those who were delegated to the great business of distributing the powers which emanated from the sovereignty of the people, and to the establishment of rules for the perpetual security of the rights of person and property, had the wisdom to adapt their languge to future as well as existing emergencies, so that words competent to the then existing state of the community, and at the same time capable of being expanded to embrace more extensive relations, should not be restrained to their more obvious and immediate sense, if, consistently with the general object of the authors and the true principles of the compact, they can be extended to other relations and circumstances which an improved state of society may produce. *Qui haeret in litera haeret in cortice* is a familiar maxim of the law. The letter killeth, but the spirit maketh alive, is the more forcible expression of Scripture."

Henshaw v. *Foster*, 9 Pick. 316.

Mr. Justice Story, on construing a provision of the Federal Constitution securing a right, says:

"How, then, are we to interpret the language of the clause? The true answer is, in such a manner, as, consistently with the words, shall fully and completely effectuate the whole objects of it. If by one mode of interpretation, the right must become shadowy and unsubstantial, and without any remedial power adequate to the end, and by another mode it will attain its just end and secure its manifest purpose, it would seem, upon principles of reasoning, absolutely irresistable, that the latter ought to prevail."

Prigg v. *Commonwealth of Penn.* 16 Peters, 612.

The object of the first clause of the 14th Amendment, was to secure the equal protection of the law in the preservation of life, liberty and property. "The mischief intended to be remedied," the denial of equal justice, is the same, whether in respect to private or corporate property. The end sought to be obtained, *i.e.* protection—is the right of all. The denial of this right of protection to corporate property, is to deny it to the property of the citizen merely because such citizen, for the sake of convenience, adopted an artificial name.

Such a construction of the 14th Amendment would be to confine its operation to "the letter which killeth," instead of to the "spirit which maketh alive,"

The Court of Appeals of Kentucky has judicially recognized corporations as persons subject to, and entitled to, the protection of the law:

"A general law concerning persons may include artificial as well as natural persons, and every corporation is a legal person. * * * * A private corporation, like a bank, or railroad, or turnpike company, is, in the technical sense, altogether personal." *City of Louisville* v. *Commonwealth*, 1 Duvall, 29.

"Persons being either natural or artificial; 'person,' by legal interpretation, includes both classes; and a corporation

being in this sense a 'person,' the appellant is *prima facie*, included in the word 'person' in the revenue law."

L. & N. R. R. Co. v. *Commonwealth*, 1 Bush., 253.

In the cases now under consideration, the Court of Appeals of Kentucky did not deny the protection demanded by the plaintiffs in error, for the reason that as corporations they were not persons within the purview of the 14th Amendment, but because, in the opinion of that Court, the equal protection of the law had not been denied to the corporation.

The Court of Appeals of New York recognizes the right of a corporation, when legally within the jurisdiction of a State, to demand and receive, as a "person," the equal protection of the law under Sec. 1, Art. 14 of the Federal Constitution.

Peoples v. *Fire Ins. Asso. of Philadelphia*, 92 N. Y., 311.

It is not necessary that citation of authority should be multiplied to show that other States have repeatedly recognized corporations as "persons," in passing upon the questions of their rights and liabilities. If, by the decisions of this Court, and the Court of last resort of the State, whose statute is now on trial, corporations are so regarded, our case is made.

What is meant by the term, "Equal protection of the laws," as used in the First Section of the 14th Amendment to the Federal Constitution.?

We cannot frame a definition for the term "equal protection of the laws," which would be at once as appropriate, and as comprehensive as the term itself. It embraces and covers as with a shield, all the rights of the citizen, whether pertaining to property, liberty or life.

Mr. Justice Miller, in the case of *Davidson* v. *New Orleans*, 96 United States, 104, when considering the meaning

of the kindred term, "due process of law," and the difficulty of precisely defining the same, says:

"But apart from the imminent risk of a failure to give a definition, which would be at once perspicuous, comprehensive and satisfactory, there is wisdom, we think, in ascertaining the intent and application of such an important phrase in the Federal Constitution, by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasonings on which such decisions may be founded."

Without attempting, therefore, a precise definition of the term, we may properly enquire what this Court and its Justices have construed to be the meaning of equal protection of the laws, in relation to the rights of property and liberty? Says the Court, in the case of *Missouri* v. *Lewis*, 101 U. S., p. 22:

"The provision in the first section of the 14th Amendment to the Constitution of the United States, which prohibits a State from denying to any person the equal protection of the laws, contemplates the protection of persons and classes of persons against unjust discriminations by a State."

In the dissenting opinion in the Slaughter House Cases, Mr. Justice Fields referring to the equal protection of the law, says:

"This equality of right, with exemptions from all disparaging and partial enactments, in the lawful pursuits of life, is the distinguishing privilege of citizens of the United States." *Slaughter House Cases*, 16 Wallace, 36.

The same learned Justice, in the San Mateo case, thus states the law:

"By equal protection of the laws is meant equal security under them to every one, on similar terms in his life, his liberty, his property, and in the pursuit of happiness. It not only implies the right of each to resort, on the same terms with others, to the Courts of the country for the security of his person and property, the prevention and redress of wrongs and the enforcement of contracts, but also his exemption from any greater burdens or charges than such as are

equally imposed upon all others, under the like circumstances.

Unequal exactions in every form, or under any pretence, are absolutely forbidden; and of course unequal taxation, for it is in that form that oppressive burdens are usually laid." *County of San Mateo* v. *Southern Pacific R. R.*, 13 Fed. Rep., 722. *S. E.* 8 *Am. and Eng. R'y. Cases. p.* 11.

This Court, speaking through Mr. Justice Fields, in case of *Barbier* v. *Connolly*, 113 United States, p. 31, says:

"The 14th Amendment, declares that no State 'shall deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the Courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and conditions, and that in the administration of criminal justice, no different or higher punishments should be imposed upon one than such as is prescribed to all for like offences."

It would be but idle labor, and show of effort, to seek for further definition after this comprehensive construction of the meaning and force of the first section of 14th Amendment. Beyond controversy, the term "equal protection of the laws;"

Protects all persons and classes of persons against unjust discriminations by the State.

Protects all persons and classes of persons against the impositions of unequal burdens.

Which, says Mr. Justice Fields, in the Sam Mateo case, applies to the burden of taxation.

Comparison of the Revenue Laws of Kentucky in relation to taxation.

We have seen, that by the provisions of the act of April 3rd, 1878, providing for the taxation of the property of railroads, and by the construction given to that act by the Court of Appeals of Kentucky, (*See page 4 of this brief.*) that the property of railroads, is real estate, divided into two classes each being the subject of a distinct valuation. The line of the railroad, together with the rolling stock, being valued as so much per mile, *upon the basis of its value, for the purpose of being operated as a carrier of freight and passengers*; while the depot grounds, improvements, and other real estate of the company are to be assessed, as real estate, independent of the purposes for which they are used.

Under this law, the valuation of the railroad track, and the valuation of the other real estate of the company, is to be ascertained in the following manner:

The property must first be reported, by a designated railroad official, under the first section of the act, which reads:

"The president or chief officer of each railroad company, or corporation owning a railroad lying in this State, shall, in the month of July in each year, return to the Auditor of Public Accounts of the State, under oath, the total length of such railroad, including the length thereof beyond the limits of the State, and designating its length within this State, and in each county, city and incorporated town therein, together with the average value per mile thereof, for the purpose of being operated as a carrier of freight and passengers, including engines and cars and a list of the depot grounds and improvements, and other real estate of said company, and the value thereof, and the respective counties, cities, and incorporated towns, in which the same are located." *Sec.* 1, *Act April* 3, 1878, *taxing railroads. See p.* 41 *of joint brief.*

The second section of the act provides that, if any railroad should be in the hands of a receiver, the receiver shall

make the returns required by the first section, and should the railroad official designated in the first section, or the receiver, fail to make the returns and valuation on or before the 1st day of August,

"the Auditor, (*i. e.* Auditor of State) shall proceed and ascertain the facts and values required by this act to be returned, and in such manner and by such means as he may deem best, and at the cost of the company failing to make the returns and values." *See Sec. 2 of Act, p. 42 of joint brief.*

We ask attention at this point to the fact; that should the railroad official, whose duty it is to make the returns, for any reason fail to make it before the 1st day of August, it becomes the duty of the Auditor of State, by *such means and manner as he may deem best,* and at the cost of the company, to ascertain and make the returns and valuation of the railroad property for taxation. It is not required of the Auditor that he shall personally examine such property in order to ascertain its condition and value; nor that he shall hear testimony as to the true value of the same, in order that he may make true and correct returns; he is simply required by "such means and manners as *he may deem best,*" to ascertain and return such valuations.

The Court will find, when we come to compare this first step in the taxation of railroad property, with the first step taken in the taxation of the property of the private citizens, how unequal is the protection of the law thus measured out.

After the returns have been made, by the railroad official, or receiver, to the Auditor of State, or has been made by the Auditor, as required by the second section, the Board of Equalization, consisting of three members appointed by the Governor of the State, under section 3 of the act, is required to

"meet at the office of the Auditor in Frankfort, on the first day of September in each year, a majority present constituting a quorum for the transaction of business; at said meetings the Auditor shall lay before them the returns made to him under this act, and any schedules and valuations, as he may have made under the second section hereof, and should the valuations, or any of them, in the judgment of said Board, be either too high or too low, they shall correct and equalize the same by a proper increase or decrease thereof. Said Board shall keep a record of their proceedings, to be signed by each member present at any meeting; and said Board is hereby authorized to examine the books and property of any railroad company to ascertain the value of its property, or have them examined by a suitable disinterested person, to be appointed by them for that purpose. The members of said Board shall hold their office for the term of four years, and shall receive for their services ten dollars per day, and all traveling and other necessary expenses, whilst in actual service: "*Provided*, that said services shall not be for a longer period than twenty days in any one year."

Sec. 3 *of Act. See p.* 42 *of joint brief.*

The sections, quoted, embrace all the provisions of the Kentucky law relating to the assessment of railroad property for taxation. What are the requirements of this law?

We note:

First, The railroad company is not required or permitted to make a return of its property, or of its valuation. This return and the valuation must be made by an official of the railroad, designated by the Legislature, *i. e.*, the President or Chief Officer.

The act of this official, in making the return and valuation, is a purely personal act. It is not the act of the company. The return made by him is not an expression of the corporation's will, either as to the character or value of its property returned. The President or Chief Officer may be the person, from personal knowledge, best fitted to make this report, or he may be the person least fitted. We know, as a

fact, that presidents of railroads are frequently but figure-heads in the organization. If he has not, from personal knowledge, the information necessary to make the report, and if he cannot, or will not, with regard to the due solemnity of an oath, swear to a matter of which he has no personal knowledge, the *corporation is in default*, for no other person can make the return. If he should, with less regard to the sanctity of his oath, swear to the returns prepared for him from the knowledge of others, then the returns made by him, are simply his report of hearsay matter. They are not the returns and valuations of the corporation. The corporation may or may not be consulted, may or may not agree with its Chief Officer upon the valuation of its property. If it should disagree, it is powerless to correct.

Second:

If the official, designated by the law, should, from willful disregard of the duties imposed upon him by the Legislature, from negligence, or from the best of reasons, fail to make his returns and valuations within a period stated, to-wit; the month of July in each year, the *railroad company* is treated as a *delinquent*, and its property is then, by the terms of the law, to be returned and valued by the Auditor of Public Accounts—a person who, presumably at least, has no knowledge of the character or value of railroad property. The duties of the Auditor of Public Accounts, as prescribed by law, are those simply of an accountant of state claims of credit or debit. This Auditor is not required, by law, to be sworn as a valuer of property for taxation. He is not required, before making and returning his valuations, to examine the property to be valued; nor to hear evidence concerning its character or value. He is not even required to see it. He may ascertain its character and value "*in such manner and means as he may deem*

best; in other words, he may value it from what information he can gather, sitting in his office in Frankfort; or he may, without any information, make his returns and valuations. All these manners and means are left entirely to his discretion. The company whose property is being assesssed, has no voice or rights in the matter of valuation by the Auditor of Public Accounts.

Third:

That after the returns and valuations of the railroad property has been made by the railroad official, or by the Auditor of Public Accounts, the Board of Equalization, provided for by the third section of the law, is required to meet at the office of the Auditor, in Frankfort, on the first day of September, in each year. At this meeting, the Auditor is required to lay before the Board, the returns and valuations made to him, or by him, under the first or second sections of the act. After the Board of Equalization has received these returns from the Auditor, *they may, by virtue of the law, make of their body a roving commission.* They may remain in active organized life for twenty days—during this period, they may, but are not required to, examine the books, and property of the several railroads. This examination, *if made by them,* would necessarily require them to travel to every section of the State. After the meeting, on the first day of September, to receive the returns from the Auditor, the law does not fix a time or place for any subsequent meeting. Upon the contrary, the law, by clear implication, gives to the Board of Equalization, the right to travel at their own will over the State, and hold their meetings at such times and places as will best suit their own convenience. The meeting on the first day of September was simply for the purpose of receiving the returns from the Auditor. The consideration of these returns, by the Board

of Equalization, must necessarily have been at meetings held subsequent to September the first; *i. e.* after the examination of the returns, and of the railroad property, if any was made, by this Board. These subsequent meetings, not being fixed by law, either as to time or place, were held at such times and places as best suited the convenience of the Board of Equalization. It was impossible, therefore, that the railroad companies could have had notice of such subsequent meetings, unless such notice was given as an act of grace or favor. The Board of Equalization is not required by law, to give notice of the time and place of its meetings. There is no legal notice provided, and no opportunity given to the railroad companies, whose property is to be taxed, of appearing before said Board of Equalization, except by the favor of said Board:

"and should the valuations, or any of them, in the judgment of said Board, be either too high or too low, they shall correct and equalize the same by a proper increase or decrease thereof."

This Board of Equalization is not required by law to examine the property they assess for taxation, whether or not they make such an examination is entirely optional with them. They are not required to hear proof as to the value of such property. They are not required to hear evidence as to the correctness or incorrectness of the valuations returned by the railroad official, or the Auditor of State. They *may* have the property "examined by a disinterested person appointed by them for that purpose," but they are not required to have such an examination made. If they should have an examination made by their appointee, such examiner is not acting under oath, either as to the thoroughness of his examination, or the impartiality of his report. The information, that he would give to the Board of Equalization, would be simply

that of a witness selected by them, testifying without being sworn. From information received in this way, or if they see proper, *without any examination of the property by them, or the hearing of any evidence whatever*, in relation to its character and value, the Board may increase the valuations to an amount limited only by their discretion.

In a report made, by this Board of Equalization, to the General Assembly of the State, in 1881, page 129, this claim of power is made:

"The law, under which railroad property is taxed in this State, left the fixing of values to the discretion of the Commissioners, and from their decision there was no appeal."

This claim of arbitrary power, by the Board of Equalization, is not a whit stronger than the law sanctions. The discharge of the duty devolved by law, is simply with them "*an act of discretion,*" from which "*there is no appeal.*" This discretion is not evolved from an examination either of the property to be taxed, or evidence of its value. If railroads have submitted their reports, they are allowed no opportunity of proving the correctness of the report. If the Auditor has made the returns and valuations, the property owner has no opportunity of showing the incorrectness of his returns and valuations. The railroads are powerless. Their property may, "*in the discretion*" of the Board of Equalization, "*from whose decision there is no appeal,*" be confiscated in the name of taxation.

The first and only notice, that the railroad company has of the action of the Board of Equalization, is the report made by the Auditor, under the 4th section of the act, when he reports to the railroad, that the Board of Equalization has completed its labors, and the amounts of the railroad assessment for taxation as fixed by said Board of Equalization.

We find, under this law:

First. That a railroad corporation cannot, by corporate action, list its property for taxation, but that the valuation of its property must be made by an official designated by the Legislature, without regard to his qualifications.

Second. Should the designated official fail to make a valuation, the *company* is treated as delinquent, and its property is then valued by a person ignorant of the character of the property, and of all the essential elements which go to determine the value of railroad property. This unqualified person may return his valuations without an examination of the property.

Third. The Board of Equalization may, without an examination of the property to be assessed, and without hearing testimony as to its value, alter and increase, in its discretion, any valuation made of railroad property for taxation, as submitted to it by the Auditor; and that while the Board of Equalization has this important question under consideration, there is given to the railroad property holder:

No right of notice of intention to increase the assessment of its property.

No right of hearing before the Board of Equalization.

No right of offering testimony to show true value.

No right of appeal from unjust, erroneous or discriminating valuations.

WHAT RIGHTS AND PROTECTIONS ARE GUARANTEED TO THE PRIVATE CITIZEN IN THE ASSESSMENT OF HIS PROPERTY FOR TAXATION.

For the sake of complete comparison and illustration, let us take the warehouse of a private citizen, situated immediately adjoining a warehouse owned by a railroad company. We have seen how the warehouse of the railroad

company will be assessed for taxation; that of the private citizen is assessed in following manner:

"All taxable estate shall be valued as of the 10th day of January in the year listed, and the person owning or possessing the same on that day shall list it with the assessor." *Sec.* 11, *Art.* 5, *Chap.* 92, *Gen'l Statutes of Ky. See joint brief p.* 59.

Under Sec. 12, of the same act, the person listing his estate for taxation, shall state separately the tracts of land, and the number of acres in each tract, and the value thereof. The number of town lots, in what town or city, and on which street situated, and the value of each. Under Sec. 13, the owner is required to swear to the correctness of the list and valuations returned by him. When this list has been received by the assessor, the law provides:

"The assessor shall, from his own knowledge, and the statement of the person listing property for taxation, and such other evidence as he may be able to obtain upon oath of witnesses sworn by him, fix a full and fair value upon all the estate listed with him for taxation." *Sec.* 16, *Art.* 5, *Chap.* 92, *Gen'l Statutes of Ky. See joint brief p.* 60.

It thus appears, in the very first step of the assessment of the property of the private citizen, that the assessor can not change the value of the property as fixed by the owner, *except from his own knowledge of the property to be assessed, supported by the sworn evidence of other witnesses.* This is the first safe guard given to the citizen against unjust assessment.

If the property owner fails or refuses to give a list of his taxable property, when called upon by the assessor, *the assessor cannot list or value the property of the delinquent,* but must report the delinquent to the County Court who shall issue a summons for his appearance. When the delinquent appears, in obedience to the summons, he is entitled to have the fact of his delinquentcy tried by jury, and if found willfully in de-

fault; he is liable to a fine and triple tax and costs. The *value of the taxable property of the delinquent must be fixed by the Court, upon the sworn statement of defendant, and such other evidence as it may obtain.*

If the Court finds that the taxpayer has a good reason for not listing his property with the assessor, the fine shall not be imposed, and the valuation of his property is to be ascertained by the County Court Clerk upon evidence.

(*Sec.* 21-22, *Art.* 5, *Chap.* 92, *Genl. Statutes of Kentucky. See joint brief, p.* 61-62.)

Before an assessor can return any one as delinquent, he shall apply at the residence of the taxpayer for a list of his taxable property, and in case of his absence, leave a written notice with some person of the household over 16 years of age, or post on the front door of his residence the time, and place such person shall meet the assessor to give a list of his property.

Sec. 6. *Art.* 5, *Chap.* 92, *Genl. Statutes of Kentucky. See joint brief, page* 58.

The second protection given to the citizen taxpayer is —if for any reason the taxpayer fails to list his property with the assessor, he has the right to go before the County Court and have the value of his property fixed, either by the Court, or clerk thereof, after a hearing and examination of witnesses under oath.

How different is this from the case of the delinquent railroad property holder; whose property is subject to assessment by a person who has never seen it, and knows nothing of its condition and value.

The assessment of the property of the private citizen, is now complete so far as the duty of the assessor is concerned, but the Legislature was of the opinion he was not yet sufficiently protected from possible injustice.

It was made the duty of the County Court to appoint three disinterested taxpayers, citizens of the county, as a Board of Supervisors, who should hold office for one year. They should hold their sessions at least two days, and might hold them six. They are required to meet on the second Monday in May, in each year, at the County Clerk's office, to hear the complaints of taxpayers, examine with care the tax books, and correct any errors of the assessor, whether in fact, or in relation to the valuation of the property listed for taxation, and in cases where they should be of opinion that any of the property has not been correctly valued, they are required to fix a proper value on the same. *They have the power to compel the attendance and examination of witnesses before them, and are required to swear witnesses, reduce the testimony of each witness to writing, which testimony shall be read to, and subscribed by the witness, and returned to the county clerk, and preserved by him.*

Art. 6, *Chap.* 92, *Genl. Statutes of Kentucky. See joint brief, p.* 64.

If the private property holder felt that he had been unjustly assessed by the assessor, he had secured to him by law, the right of review before this Board of Supervisors, whose time and place of meeting was fixed by law, with the right to again produce his witnesses, and have their testimony reduced to writing and preserved.

And still the legislature did not consider that taxpayers were sufficiently protected from unjust assessments.

On the 3rd day of April, 1878, *only the day before the statute now complained of was approved and became a law*, an amendment to *Art.* 6, *Chap.* 92, was approved, which, in express language, prohibited *the Board of Supervisors from changing or altering the valuation of property as fixed by the assessor, without giving notice to the owner, which notice was required to*

be served upon the owner, by an officer of the county, authorized by law to serve summons. This amendment further provided, *that from any decision of the Board of Supervisors concerning the true value of his property, the owner might appeal to the County Court and have the question of the true value tried by the Judge thereof, and when the amount of taxes to be computed on the property exceeded fifty dollars, the owner was given the right of appeal to the Circuit Court.*

Act to amend Sec. 6, Art. 6, Chap. 92, of Gen'l Statutes of Ky. See joint brief p. 66.

The Court of Appeals of Kentucky has held in this case, that the provision of the law, which required the Board of Equalization to meet on the first day of September, at the office of the Auditor, *to receive from him the return of railroad property, which had been made to him under the first section of the act,* was sufficient notice to all the railroads that the Board of Equalization would increase their assessments; that the law having fixed the first day of September, for the *first* meeting of the Board of Equalization, railroads were entitled to no other notice of a proposed increase of the valuation of their property for taxation; and this, notwithstanding, the law provided, that the Board might remain in session for twenty days, holding meetings at different points in the State; which meetings necessarily preceded the, determination of the Board to, increase any of the valuations.

By positive legislative enactment, the providing, in the act, of the time certain, and place certain, of the meeting of the Board of Supervisors, was not notice to the citizen taxpayer, that he should expect or look for an increased assessment of his property for taxation; we submit that it is not an equal protection of the law, to say to another taxpayer, the notice which the *law says* is not sufficient for your neighbor, shall be sufficient for you.

We submit that it is not an equal protection of the law, to provide that one taxpayer, before his assessment is increased, shall be served with *actual* notice of the proposed increase ; shall have the opportunity of introducing evidence, with the right of appeal to two high judicial tribunals ; and say to another taxpayer, you are entitled to no actual notice ; you shall have no right to introduce evidence ; you shall have no right to appeal ; as the law has fixed the time and place of *one* meeting of the Board, which has control of the assessing of your property, although it may have twenty subsequent meetings, of which you may have no knowledge or information, yet you have secured to you, by law, all the rights and protection you are entitled to.

The comparison of the Act of April 3, 1878, with the statute providing for the assessing of other property for taxation, shows such marked differences, as to warrant the conclusion that the Assembly intended to produce different results in the one case from the other ; intended to deprive the railroad property owner, of the security and the means of redress thrown around all other property in the Commonwealth.

There is guaranteed to the citizen tax-payer by the law :

First. The right of listing and valuing his property, which valuation the Assessor cannot alter, except upon sworn testimony that it is incorrect, confirmed by his own actual knowledge of the property.

Second. The right, for sufficient reason, to refuse to list his property with the assessor, and to have its value fixed by evidence in Court, or before the County Clerk.

Third. The right to remain quietly at his business, without fear of an increased assessment of his property, until he has been personally served with notice from the Board of Supervisors, that they contemplate increasing his assess-

ments, with the right, after such notice, to take before the Board of Supervisors, his witnesses, have them examined, their testimony reduced to writing, and preserved.

Fourth. The right of appeal upon the question of the valuation of his property—from the decision of the Board of Supervisors, to the County Court—from the County Court to the Circuit Court, with the right of introducing evidence on each appeal.

Were we not right in saying, that one tax-payer was the favorite of legislation, surrounded and protected by an impassible bulwark of positive enactments, secured by every safe-guard and protection which the ingenuity or wisdom of man could conceive; while the other, was left helpless and unprotected, dependent upon the discretion of an irresponsible Board of Assessors?

The unjust discrimination of the law of April 3rd, is, if possible, still more apparent, when we compare the law assessing the real estate of railroads for taxation, with the laws assessing the real estate of other corporations.

The real estate of bridges, mining or manufacturing companies, and street railroad companies, are valued for taxation by the company, through its president, treasurer, secretary, agent or other representative. *The valuation thus fixed is returned to the Auditor of State, and is final and conclusive.*

See Sec. 3, *Art.* 12, *Chap.* 92 *of Genl. Statutes. See joint brief p.* 71.

Under Sec. 4, of the same Act, the property of gas and water companies, including real estate, buildings, engines, machinery, pipes above and below ground, reservoirs, retorts, tanks, etc., are valued by the company, through a report made to the Auditor, by the president, secretary or treasurer of the company, *and the value reported by the compuny is final and conclusive.*

See joint brief, p. 72.

No Board of Equalization is required, or permitted, to review the valuation made by these companies, or increase the same.

In the *single instance* of railroad assessment, is power given to increase the valuation of their property, by the arbitrary action of a Board of Review. If there can ever be a case where the taxpayer will be entitled to the equal protection of the law, as against unjust State discrimination in matters of taxation, the case is now before this Court.

We desire, in this connection, to notice two claims,—it seems to us, unfair claims—made by the learned counsel for defendants in error, and sanctioned by the decision of the Court below.

These claims are:

1st. That the record shows that plaintiff in error received actual notice of the sittings of the Board of Equalization; and had the opportunity of appearing before that Board.

2nd. That plaintiffs in error are, none of them, complaining that the assessment of their property was too high, or that such assessments were unjust or unreasonable.

We say that these claims are not fairly made, because the record shows, that in the answers filed in the Circuit Court the allegation of actual notice of the sitting of the Board of Equalization, of the appearing before it of plaintiffs in error, was specifically denied. It was afterward concluded, as the Attorney General well knows, because the action was taken after consultation with him, that if the position taken by the railroads was correct *i. e.*, if the law was void, because it did not provide that notice and right of hearing should be given, the defect in the law could not be cured by an attempt of the Board of Equalization to give a notice. In other words that

the Board could not, by any action it might take, correct a defect in the law. It was, therefore, not deemed necessary to inject into the case, any issue of fact, as to what was notice, or whether or not any notice had been given. For this reason, all issue of facts were withdrawn, in order that the question presented might be one purely of law.

"*The constitutional validity of law is to be tested, not by what has been done under it, but what may, by its authority, be done.*" *Stuart* v. *Palmer*, 74 N. Y., 183.

The second claim, *i. e.*, that the railroads are not complaining that their property was assessed too high, or that such assessments were unjust or unreasonable, is more inexcusable than the first proposition. The learned counsel for the defendants in error knew, or should have known, that the reasonableness or the unreasonableness of the valuation of property for taxation cannot be heard in Courts.

Errors in valuation, to the prejudice of a taxpayer, must, under the general law, be corrected in the manner provided by law, that is, by appeal to the Board of Supervisors, and from the Board of Supervisors, to the County Court, and to the Circuit Court, as we have before shown. The denial to these plaintiffs in error, of the right to review erroneous assessments, is one of the great evils complained of. There was no way provided by law, by which they might question the *correctness* of the assessments made by the Board of Equalization. In this very case, the Court of Appeals has said :

"It is only a question with the Legislature, whether the property of such a corporation shall be assessed by the railroad commissioners, *whose judgment shall be final*, or subject their property to assessment by the County Assessors, subject to the revision by the County Supervisors, or the County Judge."

To say that we are not questioning the correctness of an

assessment, when the very ground of complaint is, that the law will not permit such a question to be made, is not an argument, but *a statement of counsel* calculated to mislead. The very fact, that these plaintiffs in error have paid to the State, the full amount of taxes due upon the valuation of their property, as returned by the railroad official, designated by law to return the valuation; and have refused to pay upon a greater valuation; accompanied by the fact, that these suits were instituted to collect the balance of the taxes, which the railroads refused to pay, is conclusive, that the railroads did, and are now, questioning, in the only way permitted to them by law, the correctness of the valuations as made by the Board of Equalization.

BY THE ACT OF APRIL 3, 1878, THE OWNERS OF RAILROAD PROPERTY ARE DEPRIVED OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

The very able and exhaustive argument, upon this branch of the case, in the joint brief filed herein, prepared by my associate, Judge Lindsay, leaves but little for me to say upon the subject.

"Due process of law" as used in the Federal Constitution, and the "law of the land" as used in the State Constitution are synonymous,—*Cooley on Constitutional Limitation, 4th Edition, p.* 437,—and guarantee simply "the right of hearing before condemnation; a proceeding upon enquiry and judgment only after trial" *Cooley on Constitutional Limitation*, 438. This applies to a right of hearing in matters of taxation, as well as in purely legal proceedings.

Says Mr. Cooley, in his work on taxation:

"The summary nature of tax proceedings has been remarked upon. Every inhabitant of the State is liable to have

a demand established against him on the judgment of others, regarding the sum which he should justly and equitably contribute to the public revenues. Every property holder in the State, whether an inhabitant or not, is liable to have a lien in like manner established against his property. Moreover, the persons who make the assessment lighten the burden upon themselves in proportion as they increase it upon others. In such proceeding, therefore, it must be a matter of the utmost importance to the person assessed that he should have some opportunity to be heard before the charge is fully established against him; and it would seem to be the dictate of strict justice that the law should make reasonable provision to secure him as far as may be against partiality, malice or oppression." *Cooley on Taxation, p.* 265.

"We should say that notice of proceedings in such cases, and an opportunity for hearing of some description, were matters of constitutional right. It has been customary to provide for them as a part of *what is 'due process of law' for these cases;* and it is not to be assumed that constitutional provisions, carefully framed for the protection of property, were intended or could be construed to sanction legislation under which officers might secretly assess for any amount *in their discretion*, without giving him an opportunity to contest the justice of the assessment. It has often been very pointedly and emphatically declared that it is contrary to the first principles of justice that one should be condemned unheard; and it has also been justly observed of taxing officers, that it would be a dangerous precedent to hold that any absolute power resides in them to tax as they may choose without giving any notice to the owner. It is a power liable to great abuse, *and it might safely have been added, it is a power that under such circumstances would be certain to be abused.* The general principles of law applicable to such tribunals oppose the exercise of any such power. This being the case, it is not to be supposed that the Legislature in any doubtful language has undertaken to confer it. *All reasonable presumption in construction should favor justice and right.*" *Cooley on Taxation, p.* 266.

These views of the eminent jurist but express concisely the judgments of the Federal and State Courts.

"The law has been careful to protect an owner of property, after giving in his list of taxable property, and which has been accepted without objection by the assessor, from any

interference with the list of the assessor, except upon notice to the owner. This notice affords the owner an opportunity to explain and defend the list he has given, and to the accuracy of which the assessor might require the owner to be sworn. The law never designed that property owners should be put so completely in the power of the assessor, as he would be, did the assessor have the authority, secretly without the knowledge of the owner, to reassess the property. Could he do so, there would be in many cases but slight protection to the owner."

Cleghorn v. *Postlewaite et al.* 43 Ills., 428.

See also Darling v. *Gunn*, 50 Ills., 424.

The Board of Equalization has no power to raise the valuation of lands as fixed by the assessor without notice to the owner.

Patten v. *Green*, 13 Cal., 325.

"It does not appear that the plaintiff had any opportunity of showing that the original valuation was correct. Under these circumstances, it seems to us that the act of the County Commissioners in raising the valuation was without authority, and void." *Kansas Pacific Railway Co.* v. *Russell*, 8 Kan., 558.

"Will it be supposed that the board (Supervisors) can indefinitely increase the assessed value of the property of the taxpayer, at any time, without notice to him? Certainly it cannot; and however full and complete might be the jurisdiction of the Board over the subject matter, yet the party interested, has, according to the plainest principles of justice, a clear right to a hearing and to a day in Court, and any other view stands opposed to reason, justice and sound policy, and to all those general principles which, in all cases, allow a party to be heard before his rights of property can be affected by any tribunal." *Sioux City & Pacific R. R.* v. *Washington Co.*, 3 Neb., p. 30.

In the case of *Stuart* v. *Palmer*, 74 N. Y. 183, where the case turned upon the right of notice to be heard, the Court through Justice Earl, thus clearly enunciates the vital principle of law for which we are contending.

"I am of opinion that the constitution sanctions no law imposing such an assessment without notice to and a hearing, or an opportunity of a hearing by the owners of the property to be assessed. *It is not enough that owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them* and give them a right to a hearing and an opportunity *to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has in fact been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but by what may by its authority be done. The Legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice.**

Stuart v. *Palmer*, 74 N. Y., 183.

See also Com'rs of Leavenworth Co. v. *Lang*, 8 Kan., 284.

Davidson v. *New Orleans*, 96 U. S., 97 and 107.

City of Philadelphia v. *Miller*, 49 Pa. St., 440.

Commonwealth v. *Runk et. al.* 26 Pa. St., 235.

Butler v. *Supervisors Saginaw County*, 26 Mich., 22.

The Court cannot, we think, but conclude both from the weight of reason and adjudication, that a law which gives to any tribunal the power to affect the property of the citizen, without a right in the citizen to be heard, on the question of affecting his property, is a violation of the 14th Amendment of the Federal Constitution

In England, the same rule has long obtained as a fundamental principle of justice.

"I apprehend," says Mr. Justice Willes, "that a tribunal which is by law invested with the power to affect the property of one of her majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds, and *that the rule is of universal application*, and founded upon the plainest principles of justice." *Cooper* v. *Board of Works for Wandsworth District*, 108 Eng. C. L. 180.

"I never heard the proposition doubted, that a party is

* Italics are our own.

not to suffer in person or in purse without the opportunity of being heard." *Painter* v. *Liverpool Gas Co.*, 3 Adol. and Ellis, 448.

"It is against natural justice to deprive a man of his right before he is heard; therefore, if there be a custom so to do, such custom would be absolutely void." *The King* v. *University of Cambridge*, 8 Modern R., 163.

The notice and hearing, that the tax-payer is entitled to, is not a matter of favor or grace to be extended by the commissioners or supervisors of taxation. It is a right, which can only be secured to him by the law which affects his property.

The essentials of such a notice are:

1st. That the law must provide for notice.

2d. The notice must be given strictly in accordance with the law.

"All these provisions (as to notice to tax-payer) being of vital importance to the tax-payer, must be regarded as compulsory, and a compliance with them as conditions precedent to any further step to charge him with a tax." *Cooley on Taxation, p.* 267.

Courts have been vigilant in protecting the tax-payer upon questions of notice when his property rights are to be affected. Under the law, of Kentucky, as has been shown, Boards of Supervisors have no power to increase the value of a tax-payer's property for purposes of taxation, until notice has been served upon the tax-payer, by an officer authorized by law to serve summons, that the question of changing his valuations will be considered by the Board. *General Statutes, p.* 1016. In other States the same safe-guard is guaranteed by judgments of courts.

"The general notice of the sitting of the board, by publication, does not amount to the notice required. The publication of notice of the sitting of the board amounts to no protection to the owner, for the sessions of the board are, or

may be, from the first Monday in August until the second Monday in September, and it could scarcely be expected that every tax-payer is to wait upon the board all this time to see if his taxes are to be increased." *Patten* v. *Green*, 13 Cal. 325.

"It is not enough that owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice, and give them a right to a hearing, and an opportunity to be heard. The constitutional validity of a law is to be tested, not by what has been done under it, but by what may by its authority be done." *Stuart* v. *Palmer*, 74 N. Y. 183.

The decision of Mr. Justice Field in case of *County of San Mateo* v. *Southern Pacific Railroad Company*, 8 Eng. and Amer. Ry. Cas., p. 1, sustains the same principle.

It must be admitted, that under the act of April 3, 1878, no notice was required.

That no legal notice could be given.

Whatever was done by the commissioners, was simply an act of favor and grace.

This case is easily distinguished from case of *McMillen* v. *Anderson*, 95 United States Reports, 37, which was a case of license tax, with the right to enjoin the collection of said tax, and to have its validity tried in the injunction proceeding. This right of trial, said Mr. Justice Miller, was due process of law.

Under the Kentucky law, there was no possible way to test the correctness of the assessment. The law itself must be questioned, and then only upon constitutional grounds. If the law is a valid law, the valuation of the Board remains unquestionable.

This case is also easily distinguished from the *State Railroad Cases*, 92 U. S., 575, so confidently relied upon by the Court below, and by the learned counsel for defendants in error:

First. The Court of Appeals of Kentucky have held that the duties of the Board of Equalization, valuing the property of railroads for taxation, under the law of April 3, 1878, were those of a board of original assessment, that is, that under the Kentucky law, the Board was authorized to originally assess the property of railroads for taxation.

Under the Illinois case, the State Board of Equalization had nothing to do with the question of original assessment, its duty being simply to equalize the property assessed, in the entire State, among the several counties of the State, and this, under rules prescribed by law.

See *Revised Statutes of Illinois, p.* 938, *Secs.* 105 107.

With this equalization, the individual property holder had nothing whatever to do. There was no possible reason, why he should appear before the Board. And there was consequently no provision for notice to any property holder.

Second. Under the Illinois law, there was no provision for notice, at any time to any taxpayer, unless a complaint had been made, by another taxpayer, that his property had been assessed too low.

Under the Kentucky law, a taxpayer must have notice of every step proposed to be taken to increase his assessment.

Third. Under the Illinois law, special constitutional provisions permitted railroad property to be taxed in such manner as the Legislature might, from time to time, direct by general law, the only restriction being that the general law should have a uniform application to all railroad property.

Under the Kentucky law, railroad property is real estate subject to the same taxation as other real estate.

Fourth. In the Illinois case, Mr. Justice Miller says:

"If a railroad company is by law entitled to such a notice, surely every individual is equally entitled to it."

In the present case,—

The law secures to *every* taxpayer, *except railroads*, the right to actual notice, and refuses such notice to railroads.

The great distinguishing features of the two cases, however, is that the labor of the State Board of Equalization, under the Illinois law, was the equalization of property all over the State, from the examination of abstracts of property assessed for taxation in the several counties. This equalization was made

"By adding to the *aggregate* assessed value thereof, in every county in which said Board may believe the valuation too low, such rate of per centum, as will raise the same to its proper proportionate value, and by deducting from the *aggregate value*, assessed value thereof, in every county in which said Board may believe the valuation to be too high, such per centum as will reduce the same to its proper value." *Illinois Statute, p.* 939, *Sec.* 111.

It must be understood by this that the State Board of Equalization, had nothing whatever to do with original assessments, and there was, therefore, no reason why a taxpayer should have notice to appear before it; and as there was no notice required for any taxpayer, no taxpayer was justified in demanding such notice as a right.

In the present case, the action of the Board is the action of original assessment, or the increase of original assessment. Every other taxpayer, except railroads has the right of actual notlce secured to him by law. The railroads have, therefore, the right to demand such notice.

This is but the converse of Mr. Justice Miller's proposition.

By the law of 1864, the tax upon railroads was changed, in Kentucky, from an *ad valorem* to a specific tax, of twenty

thousand dollars per mile. The object of this legislation was in the language of Judge Robertson, in *Louisville & Nashville R. R.* v. *Commonwealth*, 1 Bush, 250, "*to fix a standard of specific instead of ad valorem tax.*" No question was ever made as to the constitutionality of the act, which made the Legislature of the State, a Board of Tax Assessors, for the reason, probably, that the specific tax applied to all the property of the class to which it attached, and to this extent, it furnished and guaranteed to the tax-payer, those essential requisites of taxation, uniformity and equality.

The power claimed by the Legislature, to apportion property for taxation, is not questioned. As by fixing specific taxes, *i. e.*, license taxes, and taxes on business or occupations, taxes on franchises and privileges, or an ad valorem tax on property, or taxes apportioned by special benefits; all this is undoubtedly a matter of legislation, but under each and every class, the constitutional rights of the taxpayer guarantees to him uniformity and equality with all others of his class. Prior to the law of 1864, the status of railroad property in Kentucky for purposes of taxation, had not been determined. It was, still an open question, until the law made it subject to a specific tax; yet, even under this specific tax, the Court o Appeals of that State, strongly, intimates, that if there was evidence to sustain the charge, that the law imposed an unequal burden, by requiring a railroad to pay upon greater valuation than was just, it would be unconstitutional.

See *Evansville, Henderson & Nashville R. R. Co.* v. *Commonwealth*, 9 Bush., 438.

Railroads remained subject to this specific taxation of twenty thousand dollars a mile, until the law of April 3rd, 1878, which again subjected them to the ad valorem tax, as prior to the law of 1864, with this important exception, that

their property was no longer subject to assessment, as was the property of other taxpayers. Railroads, being again subject to taxation as real estate are not protected as is other real estate and in this, we claim the injustice of the law consists. Recognizing, as we do, the power of the Legislature to classify and apportion property for taxation, and to fix the standard, either by specific or ad valorem tax, we deny power in the Legislature to discriminate against persons of the same class, either in question of valuation or rate of taxation:

"Although there may be a discrimination in the subjects of taxation, still persons, in the same class, and property of the same kind, must generally be subjected to the same common burden." *Lexington* v. *McQuillan's Heirs*, 9 Dana, 513.

"When the subjects of taxation have been determined, then the constitutional limitation, requiring equality and uniformity in its imposition upon such subjects applies, and Courts are bound to see that the limitation is not disregarded." *Broadway Baptist Church et al.* v. *McAtee & Cassily*, 8 Bush., 508.

It is not, therefore, a sound argument which maintains, that because the Legislature has power to lay a specific tax, or to classify and apportion property for taxation, that there is, therefore, reposed in the Legislature, that supreme and sovereign power, which can impose upon a class more than its just burdens, or require a member of a class to submit to impositions that are not laid upon others. "The power to tax involves the power to destroy," says an eminent jurist. The only safeguard against destruction, in the name of taxation, is constitutional protection, and no protection is guaranteed, if any class of citizens is the subject of discrimination; or if supreme power to value for taxation is arbitrarily reposed in any body, be it the Legislature of the State, or a Board of Tax Supervisors.

Clearly upon every principle of natural justice, the logic

of reason, and weight of authority, these laws which work so invidious and unjust discrimination between citizens who are entitled to the equal protection of the law; which work a confiscation of the property of the taxpayer under the name of taxation, which deny the right of hearing, of review, of appeal, substituting for the due process of the law, the arbitrary discretion of a Board of Commissioners, are antagonistic to, and in conflict with, those safeguards which the Federal Constitutions have thrown around the citizen for the protection of his life, liberty and property.

We respectfully ask a judgment of reversal.

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WM. LINDSAY,
HOLMES CUMMINS,
Of Counsel.

AUTHORITIES CITED.

RAILROAD TO BE TAXED AS REAL ESTATE.

Act of April 3, 1878, Gen'l Statutes of Ky., p. 1019, Sec. 1, Sec. 4.

C., N. O. & T. P. Ry. v. Commonwealth, 81 Ky., 503.

Copeland v. Copeland, 7 Bush., 350.

CORPORATION IS "PERSON" WITH'N 14TH AMENDMENT OF FEDERAL CONSTITUTION.

Bank of U. S. v. Deveaux et al., 5 Cranch, 62.

Providence Bank v. Billings et al., 4 Peters, 562.

United States v. Amedy, 11 Wheaton, 393.

Beaston v. Farmers' Bank of Delaware, 12 Peters, 102.

The Society, etc. v. Town of New Haven, 8 Wheaton, 489.

National Bank v. Graham, 100 U. S., 699.

L. C. & C. R. R. Co. v. Letson, 2 Howard, 497.

Marshall v. B. & O. R. R. 16 Howard, 314.

Paul v. Virginia, 8 Wallace, 168.

Bank of Augusta v. Earle, 13 Peters, 519.

Slaughter House Cases, 16 Wall., 36.

San Mateo Case, 13 Fed. R., 722; 8 Am. & Eng. Ry. Cases, 1.

Richmond & F. R. R. v. City of Richmond, 96 U. S., 521.

Chicago Life Ins. Co. v. Needles, 113 U. S., 574.

City of Louisville v. Commonwealth, 1 Duval (Ky.), 29.

L. & N. R. R. Co. v. Commonwealth, 1 Bush (Ky.), 253.

Peoples v. Fire Ins. Assoc. of Philadelphia, 92 N. Y., 311.

THIS TERM SHOULD RECEIVE A LIBERAL CONSTRUCTION.

Martin v. Hunter's Lessees, 1 Wheat., 326; Marshall, C. J.

Woodson v. Murdock, 22 Wall., 351; Miller, J.

Parker, C. J., in Henshaw v. Foster, 9 Pick., 316.

Story, J., in Prigg v. Commonwealth, 16 Peters, 612.

THE TERM "EQUAL PROTECTION OF THE LAWS."

Davidson v. New Orleans, 96 U. S., 104; Miller, J.

Missouri v. Lewis, 101 U. S., 22.

Slaughter House Cases, 16 Wall. 36; Fields, J.

San Mateo Case, 13 Fed. R. 722; 8 Amer. and Eng. Ry Cases, 11

Barbier v. Connolly, 113 U. S. 31; Fields, J.

PROTECTION GUARANTEED PRIVATE CITIZEN, IN ASSESSMENT OF HIS PROPERTY, BY LAWS OF KENTUCKY.

Art. 5, Chap. 92, Genl. Stat. of Ky., Secs. 11, 12, 16, 21, 22, 6.

Art. 6, Chap. 92, Genl. Stat. of Ky.

Act to amend Sec. 6, Art. 6, Chap. 92 Genl. Stat. of Ky. (See Bullit & Feland's Genl. Stat. of Ky., 1881, p. 1016.)

Secs. 3 and 4, Art. 12, Chap. 92, Genl. Stat. of Ky.

CONSTITUTIONALITY OF LAW TESTED BY WHAT MAY BE DONE BY ITS AUTHORITY.

Stuart v. Palmer, 74 N. Y., 183.

THE ACT OF APRIL 3, 1878, DEPRIVES RAILROADS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

Cooley on Const. Lim., 4 ed., p. 437, 438.

Cooley on Taxation, 266, 267.

Leghorn v. Postlewaite, et al., 43 Ills. 428.

Darling v. Gunn, 50 Ills. 424.

Patten v. Green, 13 Cal 325.

Kansas Pacific Ry. Co. v. Russell, 8 Kan. 558.

Souix City & Pacific R. R. v. Washington Co., 3 Neb. 30.

Stuart v. Palmer, 74 N. Y., 183.

Commissioners of Leavenworth Co. v. Lang, 8 Kan. 284.

Davidson v. New Orleans, 96 U. S. 97 and 107.

City of Philadelphia v. Miller, 49 Pa. S., 440.

Commonwealth v. Runk, et al., 26 Pa. St. 235.

Butler v. Supervisors Saginaw County, 26 Mich. 22.

Cooper v. Board of Works, 108 Eng. Com. Law, 180.

Painter v. Liverpool Gas Co., 3 Adolp. & Ellis, 448.

The King v. University of Cambridge, 8 Modern R., 163.

See

San Mateo Case, 8 Eng. & Am. Ry Cases, p. 1.

McMillen v. Anderson, 95 U. S. 37.

State Railroad Cases, 92 U. S., 575.

R. S. Illinois, p. 938, Secs. 105–107; p. 939, Sec. 111.

L. & N. R. R. Co. v. Commonwealth, 1 Bush (Ky.), 250.

E. H. & N. R. R. Co. v. Commonwealth, 9 Bush (Ky.), 438.

Lexington v. McQuillan's Heirs, 9 Dana (Ky.), 513.

Broadway Church et al. v. McAtee, 8 Bush (Ky.), 508.

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IN THE

Supreme Court of the United States.

OCTOBER TERM 1885.

Nos. 497, 498 and 499.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILROAD COMPANY, Plaintiff in Error,

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, Plaintiff in Error,

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error.

THE CHESAPEAKE, OHIO AND SOUTHWESTERN RAILROAD COMPANY, Plaintiff in Error,

vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

Argument for Plaintiffs in Error by HOLMES CUMMINS.

WILLIAM LINDSAY,
C. B. SIMRALL,
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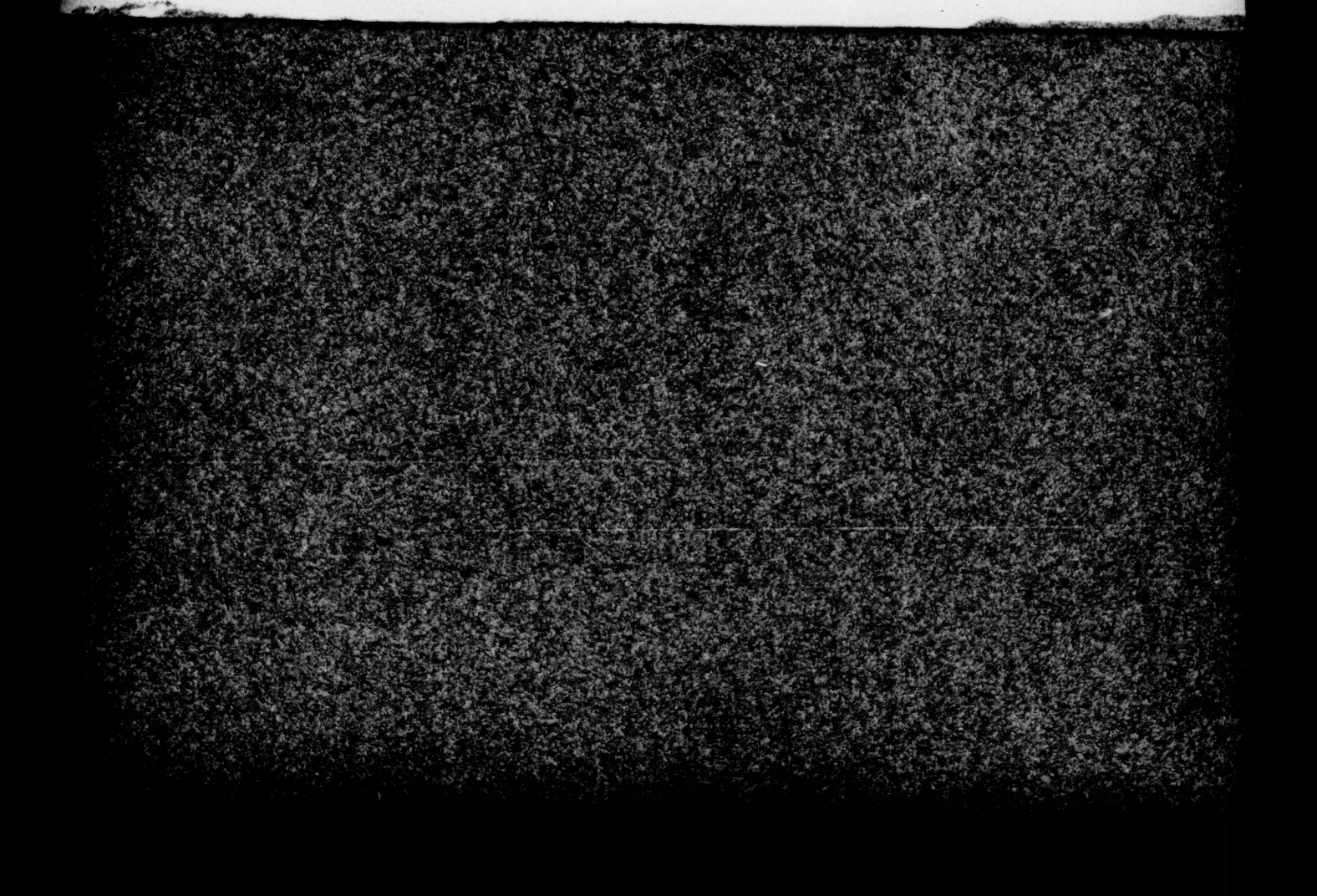
Thomas McGill & Co., Law Printers, Washington, D. C.



IN THE

Supreme Court of the United States.

October Term, 1885.—Nos. 497, 498 and 499.

THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILROAD CO., PLAINTIFF IN ERROR,

vs.

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THE CHESAPEAKE, OHIO AND SOUTHWESTERN RAILROAD CO., PLAINTIFF IN ERROR.

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THE COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

In Error to the Court of Appeals of the Commonwealth of Kentucky.

Argument for Plaintiffs in Error by Holmes Cummins.

Since these causes were heard before the Court of Appeals of Kentucky, and indeed only since the briefs of the

learned counsel for the Commonwealth have been filed herein in this court, have we known that views would be presented here other than those on which the Commonwealth rested these cases in the State court.

Certain positions taken by those counsel here for the first time seem to call for a reply from plaintiffs in error on points not considered in the briefs we have heretofore filed, for the reason of our being now for the first time apprised that the counsel for the Commonwealth would assume the positions that we now find them in.

To meet those arguments as to *notice, due process of law, and appearance,* we submit the following:

FIRST. The defendant in error, who was the plaintiff in these suits, as begun in the State Circuit Court—suits begun to enforce her demand for these taxes in the action at law, the statutory remedy therefor—averred in the petitions (see Record No. 499, page 4) "that said board"—meaning the board of assessors—"continued its sessions from day to day, as provided by law, of which defendant had due notice; and plaintiff avers that the defendant did appear before said board, by its officers, agents, and attorneys, and presented to said board such facts, figures, and information and argument in relation to the valuation and assessment for taxation of its said property as it saw proper to. Plaintiff states that said board, after a full hearing of defendant by her officers, agents, and attorneys, and a full consideration of said returns, reports, information, and arguments before them, valued and assessed for taxation," &c.

Here it will be noted that the only notice averred is notice of the meetings of the board—not a notice that the company's schedule was considered incorrect or insufficient; not a notice of any purpose to question the valuations returned in the schedule, much less to increase such values. The charge is simply that the railway companies had due notice of the meeting of the board, of when and where the board would sit—no more.

The allegation as to appearance of the companies before the board is also limited to mere presentation of information, figures, and argument, and it is plainly inferable, if indeed not so stated in so many words, that no other statements or information or figures or argument were before the board on these matters save those so presented by the companies; if, however, such other or opposing statements were heard by the board, then the petitions virtually admit that the companies had no notice thereof, nor any opportunity to controvert or examine as to such matters.

In the arguments in the State courts the counsel for the Commonwealth admitted that unless the statute, under which the assessing board was organized and proceeded, directed notice to be given plaintiffs in error, then no giving of actual notice would avail; and in that case, neither such actual notice nor any appearance thereunder would bind the companies.

Under that admission the issues of fact raised in the answers as to such notice and appearance were withdrawn.

However, now, it seems that stress is laid on the want of denial of the allegation of notice of the meeting of the board, and of that as to an appearance before that board. And then again it is argued that in these suits in the State Circuit Court the companies could have defended on the ground of unequal assessments or excessive and unwarranted increase of valuations, and so there had their day in court, *on due process*, as this court, in *Hagar* v. *Reclamation District*, held would be sufficient to come within the constitutional requirement.

SECOND. It will be remembered, as already argued and shown in our brief, that throughout the entire system of taxation in Kentucky the schedule of his properties and values, verified by the oath of the tax-payer, was the initial step. Also that, as to the citizen tax-payer, without such sworn schedule the assessor could do nothing save only to

report to the County Court the name of the person as a *delinquent*, and that on such report original, leading process issued from that court to summons the party before the court when, on his being summoned, he might be fined and triple taxed if his delinquency was found to be willful, or otherwise be only required to file his schedule and list his property with the clerk.

We showed, further, that the assessor could not assess property above the value fixed in the tax-payer's verified schedule on his judgment alone, but by the statute was required to also have "*other evidence as he may be able to obtain upon oath of witnesses sworn by him.*" The three elements or bases on which the assessment at a higher figure can alone rest are connected by the conjunctive *and.*

In the statute providing for the assessment of railway properties for taxation, we find this same verified schedule, made by the tax-paying company, also here forming the base on which all the after-steps are to rest.

This verified list or schedule must be presumed correct until overturned by stronger proof.

The State has required it and made it its agency on which to rest its assessment. When made and filed, it becomes both a shield against a higher value, except on a hearing and proof, as well as a warrant of *fieri facias* or *distraint* for the tax arising thereon.

As to, virtually, all other corporate property in Kentucky, this verified schedule of assets and values is the single and only thing done towards an assessment thereof for taxation, the State accepting that as final.

Can it be maintained that any board of assessors *can arbitrarily raise* or increase the *values so scheduled and listed, without actual notice to the tax-payer of the purpose so to do, and an opportunity to contest the proofs on which such increase may be claimed?*

In *R. R. Co.* v. *Russell*, 8th Kansas, 374, Judge Brewer, now United States circuit judge, when the action was to

restrain the collection of taxes, said "that the county board has no power to increase the valuation of personalty without notice to the party, that he may have an opportunity of showing that his statement or the return of the assessor was correct;" and the same principle underlies the opinion of the same judge in the case of *R. R. Co.* v. *Commissioners of Wyandotte Co.*, 16 Kansas, 587.

In the case of *Bank, &c.*, v. *Cook*, 77 Illinois, 622, the rule we are contending for was thus stated:

"When a party liable to taxation makes out and returns to the assessor a list of his taxable property, which is accepted by the assessor without question, the latter has no power afterward, of his own motion, to alter it *without giving notice* to the party."

In *Darling* v. *Gunn, Collector*, 50 Illinois, 424, it was held that "when an assessment upon personal property made by a town assessor was reduced by the town board of revision, and afterward the county board of supervisors, *without any notice of their intended action* to the owner of the property, raised the assessment to the original amount, the tax, to the extent it was increased by the action of the board of supervisors *without such notice*, was levied without authority, and its collection is enjoined."

The same court had, in *Cleghorn* v. *Postlewaite*, 43 Illinois, 428, said:

"When a party liable to taxes makes out and delivers to the assessor a list of his taxable property, and which is accepted by the assessor without question, that officer has no power afterward, arbitrarily and of his own motion, to alter it without first giving the party assessed notice."

And again had said that "it is eminently just that no person should be deprived of his property without being heard; and it may be that he cannot until such opportunity is afforded, *even in the assessment of taxes for the support of the Government.* Be that as it may, *we have no hesitation in*

holding that when the board of supervisors exercise the power to raise the assessment of an individual, he must have notice and an opportunity to be heard before it can be legally done, even if they possess such a power."

In *Patten* v. *Green*, 13th Cal., 325, the Supreme Court of that State affirmed the same rule. There the statute made the supervisors of the county a board of equalization, fixed the time of their sessions, and granted them power to determine all complaints regarding assessed values for taxation, with power to change and correct by adding thereto or deducting therefrom. The court held that this board had no power to raise the valuation of land as fixed by the assessor *without notice to the owner;* that the general notice of the sitting of the board is not sufficient, and their action in raising values without actual notice is void.

The Supreme Court of Indiana, in the recent case of *Campbell* v. *Dwiggins*, 83 Ind., 473, which was a proceeding to restrain township trustees and collectors from enforcing payment of certain taxes assessed for drainage purposes, on the ground of want of notice in the matter of the assessment, &c., said "the two sections of the statutes—10 and 23—now under consideration clothe the township trustee with absolute, unlimited, and final power in keeping the ditches or drains, or parts thereof, in his township in proper repair and free from obstruction. He determines the necessity for such repairs and removal of obstructions and 'the costs thereof,' and his determination is final. He apportions and assesses such costs upon the lands which will be benefited by such repairs or removal of obstructions, 'according to such benefits in his judgment,' and his apportionment, assessment, and judgment are alike final and conclusive. He makes a statement of such assessment, and delivers the same to the county auditor, who puts the same upon the succeeding tax duplicate, and it becomes a lien upon the lands, and is collected in the same manner as state and county taxes. Each and all of these proceed-

ings are strictly *ex parte*, and the owner of the lands affected thereby is not given his day in court. *There is no provision in either of these sections, or in either of the acts in which such sections respectively appear, for any appeal from any decision, assessment, or proceedings of the township trustees touching the repair or removal of obstructions from any ditch or drain by any owner of lands affected thereby to any court, or for any trial or hearing of the grievances, if any, of the owner.* We are therefore of the opinion that sections 10 and 23 of the above-entitled acts are clearly repugnant to and in conflict with the provisions of section 12 of the Bill of Rights in our State Constitution, that every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. These sections seem to us also to be repugnant to the provision in section 1 of article 14 of the Federal Constitution." Citing for authority among other leading cases those of *Davidson* v. *New Orleans*, by this court, and *Stuart* v. *Palmer*, 74 N. Y., 183.

In the case of *Gatch* v. *City of Des Moines*, 63 Iowa, 718, the Supreme Court of that State, in a proceeding in equity to enjoin the collection of a sewer assessment, held "that the collection of a tax for sewerage purposes, levied upon abutting property in the city of Des Moines under a city ordinance passed pursuant to chapter 162 of the acts of the Seventeenth General Assembly, *should be enjoined, because neither said act nor said ordinance makes any provision for notice of the assessment to the owners of the property*, and it does not appear that the plaintiff herein, as one of said owners, either petitioned for the construction of the sewer in question or otherwise waived his right to a notice and a hearing;" and further, that "the enforcement of a tax levy is a mode of depriving the citizen of his property, and when the assessment is not specific and imposed upon all persons equally (as in the case of a poll-tax and the like) it is necessary for its validity that the tax-payer have due notice of the assessment and an opportunity to be heard in opposi-

tion thereto, to the end that he may not, in violation of constitutional guarantees, be deprived of his property without due process of law."

The Supreme Court of Michigan, in the case of *Thomas* v. *Gain*, 35 Mich., 155, in considering the question whether city taxes for sewerage purposes may be assessed upon lots and lands benefited in proportion to their superficial area, and if so, whether such assessment can be lawfully made without giving the parties concerned an opportunity to be heard, and speaking through Cooley, Chief Justice, said:

"In this country we do not allow the justice of an assessment to be enquired into in a suit to charge the officers with a personal liability, *but it follows legitimately from this that parties taxed must have an opportunity to be heard regularly at some stage in the proceedings.* Their rights are not to be concluded by proceedings which are wholly *ex-parte.* * * * Parties whose property is to be taken under summary tax proceedings are entitled *as of right* to be heard at some stage of the proceedings before the tax shall become an established charge against them or their property."

As late as the April term, 1884, of the Supreme Court of Colorado, that court, in *Brown* v. *The City of Denver*, 7 Col., 305—where the proceeding was to enjoin the issue of certificates of assessments for paving done under an ordinance of the city providing that the work should be let by contract to the lowest responsible bidder, and on completion the city engineer should issue certificates to the contractor showing the number of linear feet constructed, the number and description of lots and blocks before which the same was constructed, and the amount due the contractor under the contract for the portion fronting on each lot; the contractor was to present the certificates to the city clerk, who was required to retain them for thirty days, to afford the lot-owners an opportunity to repay the amounts, when, if such repayment was not made, he was to certify the certificates to the county clerk, who was to place the

amounts so certified upon the tax-list for the current year, as a special assessment against each of the lots, to be collected as general city taxes are collected,—held that "when the validity of a law or ordinance is questioned upon the ground that it authorizes the taking of property without such notice or hearing"—meaning the constitutional requirement as to due process of law—"*the objection is not obviated by proof that a hearing has been had as a matter of favor in the case. Nor does it satisfy the constitutional requirements that the assessment is fair and just. A valid assessment cannot be made under an invalid law or ordinance; and its constitutionality is to be tested, not by what has been done under it, but by what it authorizes to be done by virtue of its provisions.*"

This doctrine, so ably stated by Judge Earle in *Stuart* v. *Palmer*, as quoted in our brief, has never been questioned, so far as we have been able to find, by any court in America, save as impliedly so done by the Court of Appeals of Kentucky in the opinion from which we have appealed to this court.

Mr. Justice Field, in his opinions in the California Railroad Tax Cases, at Circuit, *County of San Mateo* v. *R. R. Co.*, 13 Fed. Rep., 145–722; *County of Santa Clara* v. *R. R. Co.*, 18 Fed. Rep., 385, has announced for the Federal courts the same sound rule.

THIRD. *This hearing must be given after the assessment is made.*

Cooley's Const. Lim., 266.
Commonwealth *v.* Runk, 26 Penn. St., 235.
City of Lowell *v.* Wentworth, 6 Cush., 221.
Thames Mfg. Co. *v.* Lathrop, 7 Conn., 550.
Leavenworth County *v.* Lang, 8 Kan., 196.

If the tax-payer does not appeal, he has the right, until notified of a contest, to suppose that the assessment will stand.

Plaintiffs in error do not complain that the law failed to

apprise them of the time when their schedules should be filed with the auditor nor that the statute did not prescribe when the auditor should deliver same to the board of assessors. But they do say that the law gave them no notice of the period of that board's sessions, nor did it provide that the board should give them *notice of an intention to increase the amount of their assessment or valuation.*

The petitions filed by the Commonwealth in these cases do not aver that notice was ever given the companies of an intention to increase their valuations, nor even that any question would be made as to their correctness.

This, we claim, is the notice that must be given.

Until the assessors conceived such intention, the tax-payer had a right to presume that his schedules were sufficient and accepted.

And it is the want of a requirement for such notice in the statute, as well as of such notice in fact, or its equivalent, an opportunity to question the finding before a revisory board, or in defense to a suit for collection of the tax, that we insist invalidates the proceedings on which the Commonwealth relies.

We insist that the purpose of the Legislatures in prescribing a date for the sessions of boards of revision of tax assessments was not that the tax-payer might attend to see whether such boards would raise his assessments, but only to prescribe a limit of time within which assessors might act and when the tax-payer might see what the assessors had done, and appeal to such boards of revision as to any wrong suffered in the assessor's action.

Thames Mf'g Co. v. *Lathrop*, 7 Conn., 550.

FOURTH. It is argued by the Attorney-General for the Commonwealth that, as this proceeding is for the collection of State revenue, the tax-payer cannot be heard to question the proceeding by which his liabily has been determined; and the opinion of this court in *McMillan* v. *Anderson*, 95

U. S., 37, is referred to in support of his argument that there is no need for notice or *due process of law* in this class of assessments.

That case, however, was upon a license or privilege tax, the distinction between which class of taxation, when the State's officers act ministerially, and *ad valorem* taxes, where, in determining values, they act judicially, is clearly pointed out in the later opinion in *Hagar* v. *Reclamation District.*

In these license-tax matters the citizen is presumed to know, when he enters upon a certain calling, or begins a business, &c., that the law has imposed the specific tax on that calling or business. There is nothing in ascertaining such taxes that calls for any inquiry into the weight of evidence. The citizen assumes the tax when he does the thing about which the law has fixed the tax. He can avoid it by not entering upon the taxed calling. He is presumed to know the law imposing the tax.

In the opinion in *McMillan* v. *Anderson* the court say that "*by summary is not meant arbitrary, or* UNEQUAL, *or illegal,*" and that it was not "*essential to the validity of this tax that the party charged should have been present or had an opportunity to be present in some tribunal when he was assessed.*"

The statute prescribed a specific tax upon retail merchants and retailers of spiritous liquors of $15 for the one and $85 for the other. The party knew—for all persons are presumed to know the law—when he entered such business, of the license tax thereon; and this court further said, as confirming the opinion that the tax-payer was surrounded by safeguards, that "however that may be, it is quite certain that he can, if he is wrongfully taxed, stay the proceeding for its collection by process of injunction," as indeed the party had in that case done.

The plaintiffs in error are not asking affirmative relief; the Commonwealth has sued these companies to recover these taxes.

In *Kelley* v. *Pittsburg*, the tax-payer sought relief in

equity to restrain the collection, and that, too, after he had appealed to the State boards of revision.

In *Sturges* v. *Carter*, the tax-payer had been brought before the Auditor *on due process*, and apprised of the charge of incorrect returns of his property.

These cases involved State revenue.

FIFTH. This court has, in a number of cases involving State revenue, where exemption from taxation was claimed as by charter contract, or where script, bank notes, or coupons by contract in a charter act or otherwse had been made receivable for taxes, and by after legislation such contract was sought to be avoided, entertained jurisdiction and granted relief. These decisions are too numerous, as well as well known, to need any reference further to them.

One of the learned counsel for defendant in error further argues that, even if there was no such notice of the meeting of the board of assessors or of their purpose to raise the valuations of the properties of these companies as would come within the constitutional requirement as to *due process of law*, still that in these suits, while before the State Circuit Court, the defense was open and could have been made there against the action of the board in raising the valuations.

This position, it is assumed, brings these cases within the rule laid down in this court in *Hagar* v. *Reclamation District*, where it was held that "the assessment under consideration could, by the law of California, be enforced only by legal proceedings, *and in them any defense going either to its validity or amount could be pleaded.*"

To this argument we have three answers to make, either of which seem conclusive against the position taken by the counsel for the Commonwealth:

(A) That the statute under which this assessment is claimed to have been made—see fifth section of act of 3d

April, 1878, in appendix to our brief, page 43—provides that for a failure to pay the taxes due on the board's assessment "the officers of the said companies shall be subject to the same penalties to which they are now subject for a failure to pay the taxes now levied by law."

Those penalties, as seen in section 7 of article 12 of General Statutes of Kentucky, page 72 of our brief, are a fine of from $200 to $500, &c.

Will counsel contend that a party may be allowed to litigate a liability claimed, and at the same time be punished by heavy fines for enjoying the privilege? When the law-making body imposed such penalties on the non-payment of the taxes due upon such assessment by the board, the conclusion would seem irresistible that they intended to make such assessment final; and this especially so when nothing whatever can be found in the statute that intimates that any such question can be made against the board's assessment in defense to a suit for the tax thereon, or otherwise.

(B) Again, the Court of Appeals of Kentucky in its opinion in these cases placed a very different construction on this matter from that now urged by counsel. Judge Pryor, speaking for that court, said (see page 18 (48) of the Record in No. 499):

"The chancellor and common-law judge should hesitate before converting themselves into tax-gatherers *or assessors*, although the ascertainment of value may be in the nature of a judicial finding. It is only a question with the Legislature whether the property of such corporations shall be assessed by the railroad commissioners, *whose judgment shall be final*, or subject their property to assessment by the county assessors, subject to revision by the county supervisors or the county judge."

And again on page 22 (62) of the Record the court says:

"It is further argued that as the board of commissioners

have no power to increase the value of such property, and that their duty on this point is confined to the equalization of the valuation as reported by the various companies. *We do not so understand the enactment; but, in our opinion, the prime object was to fix the true value and increase each valuation, or the aggregate value, if in the opinion of the board the value was too low. It is, in fact, an assessing board, and the value fixed by the commissioners must stand.*"

We need not argue nor cite authority to show that as to the construction or meaning of this statute the State court binds us here, and the opinion shows that the State judges considered the action of the board as an original assessment, and that their action in so increasing the valuations of these companies' properties was final; that no court would presume to question the correctness of their judgment or action unless the Legislature had plainly imposed that duty upon the judicial department.

That court, speaking through Chief Justice Cofer, in *Pennington* v. *Woolfolk*, 79 Ky., 16, said:

"The power to assess property for taxation, that is, to apportion the tax upon the property upon which the Legislature has imposed it, is not judicial, *and can no more be conferred upon a judicial tribunal than the power to levy taxes.*"

And again, in *McLean County Precinct* v. *Bank of Owensboro*, 81 Ky., 254, that court held: Where the action of the chancellor had been invoked to collect through a receiver certain assessed taxes, the agencies designated by the statute for that purpose having failed or refused to appoint a collector therefor, "that it will be conceded that it is not one of the inherent powers of any judicial tribunal, whether State or Federal, to levy and collect taxes; and when the instrumentalities selected by the law-making power for making such collections cease to exist, or decline to act, the remedy is in the legislative department of the State government, and not with the judiciary."

Citing with approval, and as an authority or precedent

for such decision, the opinion of this court in *Merriweather* v. *Garrett*, 102 U. S., 472, as well as the opinion of Mr. Justice Mathews, at circuit, in the case of *Thompson* v. *Allen County*, 13 Fed. Rep., 97, where the following language was used:

"*The collection of a tax belonging as much to the authorities of the State as its levy and assessment, and the reasons which forbid a court to supply the latter, apply with equal force to the former. The jurisdiction of courts is confined to compelling the State officers to perform their duties under State laws, and no substitute can be invented.*"

The Attorney-General seems to coincide with our view of this question. He says at page 5 of his brief that "the judiciary can neither levy taxes nor direct or dictate how the legislative branch of the Government shall perform this sovereign function. The amount of taxes essential to the life of the Government, *and the manner and mode of their assessment* and collection, must of necessity be determined by the legislative branch of the Government. Hence the courts, whenever brought face to face with the question have recognized the boundary-line beyond which they could not pass."

(c) Only to emphasize the reasons above given against the position that in these suits below the defense was open, and could have been made regarding the validity of the board's action in increasing the valuations, we would further ask attention to the confusion and inequality that would result. The statute requires (see page 44 of brief) that "the taxes in behalf of the Commonwealth may be recovered by action in the Franklin Circuit Court and those in behalf of the counties by actions in the courts of civil, common-law jurisdiction in such counties respectively."

That would allow one court to review the assessment as concerned the State's tax and perhaps the Circuit Courts of a dozen other counties revise the assessment as to the tax

for those counties. In each case the question at issue would be the same—that is, the value for taxation of the entire road and property of the railway company on the mileage of which in the State the State taxes would be computed and on the mileage in each county such county tax would be ascertained. For that court has decided in a half dozen or more cases, beginning with *Applegate* v. *Ernst*, in 3d Bush., *that a railroad can be valued for taxation only as an entirety.* We need not suggest the inevitable result of different conclusions in these several tribunals.

The opinion from which we have appealed in error to this court sets these forth in the following words:

"A railroad must necessarily be regarded as a unit, and, as this court has determined, by reason of legislative authority, must be taxed as such. Its rolling-stock cannot be seized and subjected for taxes as seized for municipal purposes, nor are the railroads listed by the assessors of the counties through which they pass for taxation. All of the locomotives, cars, etc., are treated as fixtures, and there is no better or more practical mode of assessing such property than to treat the whole as real estate. * * * *Fragmentary taxation of the same line of road by a dozen or more different assessors would scarcely produce that uniformity in assessments so absolutely essential to produce equality in taxation.*"

Such result would as certainly follow from a dozen or more suits, before as many different judges and juries, as from different assessors' action.

Counsel have failed to remark the essential distinction between the statutes of Kentucky, on which they rely in this case, and the laws of California that determined this court in "*Hagar* v. *Reclamation District.*"

We have already shown how not only the statute does not allow in this suit any question to be raised as to the assessment or its amount, but how the courts of Kentucky have adjudged that such assessment is final, and have refused, in the absence of express legislative imposition of

such duty, to consider such question, as well as the inequalities necessarily resulting from such a construction.

We have but to refer to the opinion in *Hagar* v. *Reclamation District* to see how different were the laws of the State affecting that decision. The laws of California allowed to the property-owner assessed, when sued for the tax or assessment, not only to make any defense against the assessment that he might have made before the commissioners had he been notified to appear and be heard before them, but further granted him the right to present defenses before the court when so sued for the tax, which would have been unavailing before the commissioners.

In *Reclamation District* v. *Evans*, 61 Cal., 104, the Supreme Court of that State, construing the statutes as to this matter, said "no assessment against any tract of land can be enforced except by action, to which the owner of the tract must be made a party (Political Code, 3466). The judgment appealed from was rendered in such an action, and to such an action the Code *does not limit the defenses*. If the provisions of the Political Code are applicable and the proposition contended for is correct, the appellant here could have shown that the sums assessed against his property were not proportionate to the benefits resulting from the works of reclamation. It has been repeatedly decided in the Supreme Court of this State that the Legislature may establish an arbitrary standard of estimating the amount of benefit derived by each tract of land within an assessment district declared to be benefited as a whole, as by reference to the number of front feet in the case of street assessments, or to the number of acres in cases of reclamation. But, for the purposes of this decision, we may assume that the Code has not adopted any such arbitrary method, but that the assessment of the commissioners must be made with reference to the actual benefits to result to each tract of land by reason of the works of reclamation. It cannot be material, however, that the

land-owner had no notice before the proportional benefit to his land was estimated by the commissioners, if in the subsequent action he has had his day in court, with full opportunity to contest the charge before it was declared a lien upon his land or a judgment to be collected out of his general property. In the case before us the defendant set up in his answer that his lands were not, and could not have been, benefited by the works of reclamation. But the court below found that the commissioners did jointly view and assess upon each and every one of said lands to be reclaimed or benefited by the works '*a tax proportionate to the whole expense and to the benefits which would and will result from the works*,' and made a list of the amount due from each owner, etc. The evidence is not before us, and we must suppose that defendant was properly assessed."

Here the defense as to the correctness of the apportionment was, under the provisions of the Code of the State, raised by the pleading. The issue thus pleaded was heard on the proofs, and the finding was against the defendant so taxed, and the Supreme Court of that State affirmed the decision.

This court, in *Hagar* v. *Reclamation District*, recognized the opportunity thus afforded when it said:

"*The assessment under consideration could by the law of California be enforced only by legal proceedings, and in them any defense going either to its validity or amount could be pleaded.*"

The principle had been settled in this court by the earlier opinion in *Davidson* v. *New Orleans*, in the following language:

"Before the assessment could be collected or become effectual, the statute required that the tableau of assessments should be filed in the proper District Court of the State; *that personal service of notice, with reasonable time to object*, should be served on all owners who were known and within reach of process, and due advertisement made as

to those who were unknown or could not be found. This was complied with, and the party complaining here appeared and had a full and fair hearing in the court of the first instance, and afterward in the Supreme Court. If this be not due process of law, then the words can have no definite meaning as used in the Constitution."

The distinction between these cases and those at bar seem too plain on the statements made to need further mention. By the Kentucky statute no notice was given the tax-payer except such as was made by the statute fixing the date when the board was to meet at the auditor's office to receive the schedule filed there. There was no period fixed for the determination of their sessions. The limit of their salary to twenty days' service in any year as prescribed in the act of 1878, when a separate board constituted the board of equalization, was not in force when by the act of 1882 that board was left out of existence and these tax-assessing duties were imposed on the board of railroad commissioners.

The law of Kentucky expressly gave this board power to increase the values returned in the schedule, and prescribed no notice to be given the tax-payer affected thereby of such action, either before it was determined nor afterward, so that he might contest such increase.

It had been decided by the Court of Appeals of Kentucky, in *Trustees of Elizabethtown* v. *R. R. Co.*, 12 Bush., , that even for unpaid taxes the collectors could not *distrain* the property of these companies, but that the collector must proceed by action at law, and compel the accounting officers of such companies to appropriate the surplus revenues of the corporation, after defraying expenses for maintenance and operation, to the payment of such taxes.

It was but following this decision, affirmed in that court in *Lincoln County Court* v. *R. R. Co.*, 3d Kentucky Law Reporter, , that the act of 1878, under which these

assessments were made, provided for appropriate actions at law to enforce the payment of taxes arising thereon.

The appearance made and hearing had, as charged in the pleading, was of GRACE *and* FAVOR, *and* NOT OF RIGHT.

The notice given, as the pleadings show, did not inform the company of the intended increase of the values of its properties; nor was it informed of any such question being raised or considered until after the board had adjourned and the Auditor sent down the increased charge.

On such an assessment no recovery should be allowed.

These views seem to answer the positions now assumed by the counsel for the Commonwealth.

HOLMES CUMMINS,
Attorney.

WM. LINDSAY.
C. B. SIMRALL,
Of Counsel,

115-321

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

1. THE LOUISVILLE & NASHVILLE R. R. CO., PLAINTIFF IN ERROR,

VERSUS

THE COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

2. THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R. R., PLAINTIFF IN ERROR,

VERSUS

THE COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

3. THE CHESAPEAKE, OHIO & SOUTHWESTERN R. R. CO., PLAINTIFF IN ERROR,

VERSUS

THE COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

Brief for Defendant in Error.

IN ERROR TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

P. W. HARDIN,
Attorney-General.

JOHN D. WOODS, PUBLIC PRINTER AND BINDER.

BRIEF FOR DEFENDANT IN ERROR.

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THE COMMONWEALTH OF KENTUCKY, DEFENDANT IN ERROR.

The foregoing three separate cases involve substantially the same questions, and, by the permission of the Court, will be briefed and heard together:

STATEMENT.

The General Assembly of the Commonwealth of Kentucky, by an act approved April 3d, 1878, entitled "An act to prescribe the mode of ascertaining the value of the property of railroad company for taxation, and for taxing the same," provided for the appointment of a Board of Equalization, and specifically defined their powers and duties; and also regulated the powers and duties of railway companies in relation to taxation.

Said act is as follows:

An act to prescribe the mode of ascertaining the value of the property of railroad companies for taxation, and for taxing same. (Bullitt and Feland's General Statutes of Kentucky, 1881, page 1019.)

SECTION 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That the president or chief officer of each railroad company, or other corporation owning a railroad lying in this State, shall in the month of July in each year, return to the Auditor of Public Accounts of the State, under oath, the entire length of such railroad, including the length thereof beyond the limits of the State and designating its length within this State, and in each county, city, and incorporate town therein, together with the average value per mile, thereof, for the purpose of being operated therein as a carrier of freight and passengers, including engines and cars and a list of the depot grounds and improvements, and other real estate of the said company, and the value thereof, and the respective counties, cities, and incorporate towns, in which the same are located. That if any of said railroad companies owns or operates a railroad or railroads out of this State, but in connection with its road in this State, the president or chief officer of such company shall only be required to return such proportion of the entire value of all its rolling stock as the number of miles of its railroad in this State bears to the whole number of miles operated by said company in and out of this State.

SEC. 2. That should any railroad, or part of a line of railroad, in this State, be in the hands or under the control of a receiver or other person, by order or decree of any Court in this or any other State, it shall be the duty of such receiver or other person to make, under his oath, the returns and valuations required by the first section of this act; and should such president or chief officer of any railroad company, or such receiver, fail to make said returns and valuations on or before the first day of August in each and every year, the said Auditor shall proceed and ascertain the facts and values required by this act to be returned, and in such manner and by such means as he may deem best, and at the cost of the company failing to make the returns and values.

SEC. 3. That the Governor of the State, on or before the first day of August, 1878, shall appoint three disinterested free-holders, citizens of this State, who shall constitute a Board of Equalization, who shall meet annually at the office of the Auditor in Frankfort, on the first day of September, in each year, a majority present constituting a quorum for the transaction of business; and at the said meetings the Auditor shall lay before them the returns made to him under this act, and any

schedules and valuations he may have made under the second section hereof; and should the valuations, or any of them, in the judgment of said Board, be either too high or too low, they shall correct and equalize the same by a proper increase or decrease thereof. Said Board shall keep a record of their proceedings, to be signed by each member present at any meeting; and the said Board is hereby authorized to examine the books and property of any railroad company, to ascertain the value of its property, or have them examined by any suitable disinterested person, to be appointed by them for that purpose. The members of said Board shall hold their office for the term of four years, and shall receive for their services ten dollars per day, and all traveling and other necessary expenses whilst in actual service: *Provided*, That said service shall not be for a longer period of time than twenty days in any one year; and before proceeding to act under their appointment, they shall take an oath before the Governor of the State that they will faithfully and impartially perform their duties as members of said Board of Equalization; and in case of the death or resignation of either, or failure to act, the Governor shall fill the vacancy by another appointment.

Sec. 4. The same rate of taxation for State purposes, which is or may be in any year levied on other real estate in this Commonwealth, shall be, and is hereby, levied upon the value so found by the said Board, of the railroad, rolling stock, and real estate of each company; and the same rate of taxation for the purposes of each county, city, town or precinct, in which any portion of any railroad is located, which is or may be in any year levied on the value of any real estate therein, shall be, and is hereby levied on the value of the real estate of the said company therein and of the number of miles of such road therein, reckoned as of the value of the average value of each mile of such railroad with its rolling stock, as ascertained as aforesaid. And immediately after the said Board shall have completed its valuations each year, the Auditor of Public Accounts shall notify the Clerk of each County Court of the amount so assessed for taxation in his county, and each railroad company of the amount of its assessment for taxation, for State purposes, and for the purposes of such county, city, town or precinct. And all existing laws in this State, authorizing the assessment and taxation of the property of railroad companies by counties, cities, or incorporated towns, are hereby repealed; and no county, city, or incorporated town

in this State shall hereafter assess, levy, or collect any taxes on the property of railroad companies of this State, except as provided by this act.

SEC. 5. All taxes levied under the provisions of this act shall be paid on or before the 10th day of October in each year; and for a failure to pay the same, the officers of said companies shall be subject to the same penalties to which they are now subject for a failure to pay the taxes now levied by law. And the taxes, in behalf of the Commonwealth, may be recovered in the Franklin Circuit Court, and those in behalf of the counties by actions in the Courts of Civil Common Law jurisdiction in such counties, respectively.

SEC. 6. That all laws, in conflict with this act, are repealed.

SEC. 7. This act shall take effect from its passage.

Approved April 3, 1878.

By another act, approved April 19, 1882, entitled "An act to amend an act, entitled 'An act to prescribe the mode of ascertaining the value of property of railroad companies for taxation, and for taxing the same,'" approved April 3, 1878, it was provided that the Board of Railroad Commissioners "shall perform all of the powers conferred on the Board of Equalization by the act to which this is an amendment."

Said act is as follows:

An act to amend an act, entitled "an act to prescribe the mode of ascertaining the value of property of railroad companies, for taxation and for taxing the same," approved April 3, 1878.

(Act of April 19, 1882, General Laws of Kentucky, Session Acts, 1882, Vol. 1, p. 99.)

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. That the Board of Railroad Commissioners appointed under an act, entitled "An act to prevent extortion and discrimination in the transportation of freight and passengers by railroad corporations, and in aid of that purpose to establish a Board of Railroad Commissioners, and define its powers and duties," approved April 6, 1882, shall perform all the powers and duties conferred upon the Board of Equalization by the act to which this is an amendment.

SEC. 2. This act shall take affect from and after its passage.

Approved April 19, 1882.

In compliance with the act of 1878, appellants made returns to the Auditor, and, as provided by these acts, the Board of Railroad Commissioners assessed and valued for taxation their property. Appellants refusing to pay, suit was instituted in the Franklin Circuit Court, and judgments rendered against the several appellants for the taxes due for the year 1882.

To reverse these judgments appeals were prosecuted to the Court of Appeals of Kentucky, and from the judgment of that court affirming the judgments below these appeals are prosecuted.

THE PLEADINGS.

There is no issue of fact made in the pleadings. It is admitted the assessment and valuations were made as provided in the law, and that the appellants had actual notice of the meetings of the Board, and were present by their agents, officer, and attorneys, and presented to the Board such facts, figures, and arguments in relation to the valuation and assessments as they saw proper to, and that these were all heard and duly considered by the Board in making the valuations and assessments.

Nor is it contended by the appellants that these assessments were too high, nor that they were not in fact just and reasonable, and equitable; but they insist that the act itself does not provide, as a matter of constitutional right, the safeguards against arbitrary assessments which is guaranteed to other tax-payers, and which they are entitled to as a protection against arbitrary and unjust assessments; they, therefore, contend that it is unconstitutional, null and void, and that they are not bound by the action of the Board.

It is but seldom that litigants are heard to complain in the Courts who admit the justice and right of the demand against them; who admit that they have not been wronged, damaged, or injured in *life, liberty, or property;* who admit, as a matter of fact, that they have not been denied any of their legal or constitutional rights; who, construing the law in their own behalf, fully avail themselves of all of its provisions, and afterwards deny that the law gave them the rights they exercised, and the protection they received.

With these admissions in the pleadinge, we insist that appellants are estopped to deny the legality of the demand against them.

Again, we insist that this is peculiarly a case in which the courts

should hesitate to maintain a principal of abstract constitutional right, when the parties appealing admit, as a matter of fact, that they were not denied any of their constitutional or legal rights, and have not, as a matter of fact, been wronged or injured.

Appellants insist that the claim for taxes against them is illegal, null and void, because the act providing for their assessment and taxation did not give them—

A right of notice;

A right of hearing;

A right of offering testimony to show true value; and

A right of appeal from unjust or erroneous valuation.

The pleadings admit that—

They had notice;

They had a hearing;

They offered testimony;

Their testimony was considered;

And there is no issue made as to the justice or correctness of the valuation.

Under this state of the pleadings, they ask the court to relieve them from taxation altogether, by declaring the acts under which they were assessed unconstitutional, because in contravention of the following clause of the constitution:

That "no person shall be deprived of his life, liberty, or property without due process of law." (*Amendment* to Federal Constitution, article 5.)

"That no person can be deprived of his life, liberty, or property unless by the judgment of his peers, *or the law of the land.*" (Bill of Rights, State Constitution, section 12.)

That "no State shall make or enforce laws which shall abridge the privilege or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." (14th amendment to the Federal Constitution.)

We have, with very great care, examined all the authorities on this question referred to by Cooley and Hilliard, and such others as we have been enabled to find. We have examined all of those relied on by appellants in argument, and they are numerous, and from them we

formulate the following propositions as fully sustained by these investigations:

1. That as the power of taxation is inherent in government, and the necessities of all governments demanding summary processes for securing revenues to preserve their own existence, the courts have all recognized the right of the law-making power to regulate the *methods* and *modes* of taxation.

2. That "due process of law" in the Federal Constitution, and "law of the land" in our constitution have never been construed to apply to the administrative processes in existence at the time of magna charta, and during and since the formation of our own constitutions.

3. That these summary administrative proceedings have existed in our State, and some of their features in all of the States and the Federal Government, since their formation, authorized by law, approved and sustained by universal custom and acquiescence, and by the courts.

4. That the right of a hearing at any point in the proceeding, from the levying of the tax, through its assessment, and up to its collection, has never in this State, or in any State of the Union, been held essential to the constitutionality of any act for the *collection of State revenues.*

5. That a right of hearing, when provided by statute, or when taxation for local purposes is authorized, has always been recognized, for the reason that such local taxation can only be sustained upon the idea of measurable *benefits* and *damages*, upon which, in reason and justice, the party taxed is entitled to a hearing. But taxation for State revenue rests upon different principles. The benefits are neither pecuniary nor measurable, such taxation being for the whole people and the State as a corporation, *and not for the individual.*

6. That no court, until the decision of the California case by Judge Field, has ever declared any general revenue law unconstitutional for want of hearing or appeal, or "due process of law" or "law of the land;" and have in no instance granted relief, except where tangible injury and damage has actually resulted from some violation of constitutional principle.

Some of these propositions may seem too broad; for in these latter days we may find decisions sustaining or refuting almost any proposition. But such has been the caution of the courts in relation to abridging legislative discretion in the matter of the *methods and modes* of taxation, that we find no case in which a tax law for general revenue

purposes has been declared unconstitutional for the want of the so-called constitutional safeguards to the citizen.

Relief from spoliation, from actual damage or wrong, will always be given.

So where the statute has itself provided safeguards against extortion and oppression, the courts properly require their observance. Also in matters of local taxation, where the act authorizing the tax fails to provide for notice and hearing, the courts have declared such acts unconstitutional, for the reason that such taxation is only authorized on the idea of measurable benefits or damages. But the power of taxation for general revenue purposes rests on a different principle.

It is a right inherent in all governments. It is not derived from nor regulated by the constitution, for on this subject the constitution of our State is silent. In it is involved the right of existence. It is therefore to the government, if I may use the expression, a natural right—*a right to live.*

From the time of "magna charta" it has been the doctrine of the English law, from which all American law on this subject has been derived, that taxes can only be imposed by the legislative branch of the government. The judiciary can neither levy taxes nor direct or dictate how the legislative branch of the government shall perform this sovereign function. The amount of taxes essential to the life of the government, and the *manner* and *mode* of *their assessment* and collection must, of necessity, be determined by the legislative branch of the government. Hence, the courts, whenever brought face to face with the question, have recognized the boundary line beyond which they could not pass.

They may grant relief from actual wrong in all cases. But they may not, in any case where no actual injury, damage, or wrong has resulted, declare a general tax law for the State's revenues unconstitutional because it failed to provide abstractly for certain guarantees for fairness or certain remedies for injustice or inequality.

Should the courts go further, they must trench upon the prerogative of another department of the government, and in so doing they would assert a power to destroy the government itself.

To illustrate: Through more than half of our existence as a State our general tax laws have not provided any of these so-called constitutional safeguards against injustice to the citizen. Even as late as 1873, when our General Statutes were adopted and became the law of the

land, and up to 1878, there was not a single provision of the law that secured the citizen a right of notice, a right of hearing, or a right of appeal at any point in the proceeding from the levying of the tax, through the process of assessment, and up to its summary collection by the agents of the law. Suppose a citizen, admitting no actual injury or wrong in the assessment of his property, should have resisted the tax upon the ground that the law did not recognize his abstract rights, and provide a right of hearing, notice, or appeal, would or could the courts have stayed all of the revenues of the State, have released the tax payers from not only their duty but their obligations to maintain and support the government? If so, the State would have died or lived only by grace and sufference, and not by her own inherent right. Can it be that our system contains the seeds of its own destruction? It must be unless to the legislative branch of the government is left the full, free, and untrammeled discretion to regulate the whole question of revenues, including the *methods of assessment and manner of collection.*

As said in Hilliard on Taxation, page 3—

"With regard to the precise mode of exercising the taxing power, "the Legislature, unless restricted by some constitutional provision, "seems to be invested with entire discretion."

Again we say, that after an examination of all of the decisions and authorities referred to and relied on by plaintiffs in error, we find they all relate to acts authorizing local taxation, which, we contend, is based on a different principle from general taxation for revenue purposes, or they are based on statutes which provide notice, hearing or appeal, the provisions of which were not complied with.

The cases at bar do not fall under either of these heads.

The question here is simply, will the courts declare a general tax law unconstitutional because the acts fails to provide for notice, hearing or appeal, and because it is, therefore, in contravention of the Federal Constitution, which provides that "no person shall be deprived of his life, liberty, or property without due process of law," and of our State Constitution, which provides that "no person can be deprived of his "life, liberty, or property except by the judgment of his peer and the "law of the land!"

The terms "due process of law," as used in the Federal Constitution, and the "law of the land," as used in the State Constitution, have never by the courts been construed to invest the citizens with the right

of hearing, notice, or appeal, as applied to the taxing power of the State.

By "due process of law," as used in the constitution, is simply meant such general legal forms and course of proceedings as were known either to the common law, or as were generally recognized in this country at the time of the adoption of the constitution.

In the case of *Murray's Lessees, et. al, vs. Hoboken Land Improvement Co.*, 18 *Howard*, 276, the court, in referring to an act of Congress providing for summary means for collecting the public dues, says:

"As we have already shown, the means provided by the act of 1820 "do not differ in principle from those employed in England from "remote antiquity, and in many of the States, so far as we know, with- "out objection, for this purpose at the time the constitution was formed. "It may be added, that probably there are few governments which do "or can permit their claims for public taxes, either *on the citizen*, or the "officer employed for their collection or disbursement, to become sub- "jects of judicial controversy according to the course of the law of the "land. Imperative necessity has forced a distinction between such "claims and all others, which has sometimes been carried out by sum- "mary methods of proceedings, and sometimes by systems of fines and "penalties, but always in some way observed and yielded to."

In the case of *McMillan vs. Anderson*, 95 *U. S. Reports*, 37, the question being the power of a tax-collector to seize and sell property for the payment of a license tax, without trial, hearing or notice, the court says, on page 41:

"Looking at the Louisiana statute here assailed, the act of March "14, 1873, we feel bound to say that if it is void on the ground assumed, "the revenue laws of nearly all of the States will be found void for the "same reason. The mode of assessing taxes in the States by the "Federal Government, and by all governments, is necessarily summary, "that it may be speedy and effectual. By summary is not meant arbi- "trary or unequal or illegal. It must, under our constitution, be law- "fully done; but that does not mean, nor does the phrase, 'due process "of law,' mean by a judicial proceeding. The nation from whom we "inherit the due process of law has never relied upon the courts of "justice for the collection of her taxes, though she passed through a "successful revolution in resistance to unlawful taxation. We need not "here go into the literature of that constitutional provision, because "in any view taken of it, the statute here does not violate it. * * * "*It seems to be supposed that it is essential to the validity of this tax that* "*the party charged should have been present, or had an opportunity to be* "*present in some tribunal, when he was assessed; but this is not and has* "*never been construed necessary to the validity of a tax;* and the fact that "most of the states now have Boards of Revisers of Tax Assessments "does not prove that taxes levied without them are void."

In the case of *Davidson vs. New Orleans*, 96 *U. S. Rep.*, 101, involving the constitutionality of a statute authorizing the collecting of an

assessment made on certain real estate to pay for draining swamp lands, the same doctrine was distinctly held.

In the case of *Kelly vs. Pittsburg*, 3*d Morrison's Transcript, p.* 104, *U. S.*, 78, the Supreme Court of the United States uses this language:

"Taxes have not, as a general rule in this country, since its independence, nor in England before that time, been collected by regular "judicial proceedings. The necessities of government, the nature of "the duty to be performed, and the customary usages of the people, "have established a different procedure, which, in regard to that matter, is, and always has been, due process of law."

And again, in *Hugh vs. Shoemaker*, 22 *Cal.*, 370, the court, in referring to the phrase, due process of law, says:

"Because universal practice had established at the time "our constitution was adopted *that this provision in the constitution was not understood as applicable to proceedings by the State to obtain from citizens "their proper contributions to the expenses of administering the government.*"

And again, in the *State vs. Allen*, 1 *McCord*, 55, the Supreme Court of South Carolina said:

"To these may be added the confinement of persons for safe custody who are accused of high crimes and misdemeanors, all cases in "the courts of equity, and in all the courts, military, maritime, and ecclesiastical, the proceedings of which are carried on without the intervention of a jury. Distress for rent also is another case within "the exception, and last, though not less satisfactorily established, distress for taxes. All these, and many others which might be mentioned, are carried on by the well-known and established principles of "common law or *lex terre*, without the aid of a jury. This method of "collecting taxes is as well established by custom and usage as any "principle of the common law. A similar practice prevailed in all the "colonies from the first dawn of their existence. It has been continued by all the States since their independence, and has existed in "England from time immemorial; indeed, it is necessary to the existence of every government, and is based upon the principle of self-preservation. * * * * * *

"I think, therefore, that any legal process which was originally "founded in necessity, has been consecrated by time, and approved and "acquiesced in by universal consent, must be an exception to the right "of trial by jury, and is embraced in the alternative, the law of the "land. Such I consider to be the summary proceeding allowed in the "collection of taxes; and I should think the proceedings in this case "authorized by the law of the land."

In the State railroad cases, 2d Otto, 613 and 614, in discussing this same question, including the right of hearing, notice, and appeal, and these cases were exactly similar to the cases at bar, the Supreme Court of the United States said:

"That there might be no misunderstanding of the universality of "this principle, it was expressly enacted, in 1867, that 'no suit for the "purpose of restraining the assessment or collection of any tax shall

" be maintained in any court.' (*Rev. Stat. sec.* 3224) And though " this was intended to apply alone to taxes levied by the United States, " it shows the sense of Congress of the evils to be feared if courts of " justice could, *in any case*, interfere with the progress of collecting " taxes on which the government depends for its continued existence. " It is a wise policy. It is founded in the simple philosophy derived " from the experience of ages, that the payment of taxes has to be en- " forced by summary and stringent means against a reluctant and often " adverse sentiment; and to do this successfully, other instrumentalities " and other modes of procedure are necessary than those which belong " to courts of justice."

And again in same Reports, page 88:

" All governments, in all times, have found it necessary to adopt " stringent measures for the collection of taxes, and to be rigid in the " enforcement of them.

" These measures are not judicial, nor does the government resort, " except in extraordinary cases to the courts for that purpose.

" The revenue measures of every civilized government constitute a " system which provides for its enforcement by officers commissioned " for that purpose.

" In this country, this system for each State, or for the Federal Gov- " ernment, provides safeguards of its own against mistake, injustice, or " oppression in the administration of its revenue laws. Such appeals " are allowed to specified tribunals as the law-makers *deem expedient.* " Such remedies, also, for recovering back taxes illegally exacted, as *may* " *seem wise*, are provided."

In the *State in rel vs. Lindell Hotel Co.*, 9 *Missouri Ap. Rep.*, 458, the court said:

" The power to raise revenue is necessary to the very existence of " government. From its very nature it must be summarily exercised, " and does not admit of the slow processes which obtain in ordinary " judicial proceedings. The reservations which have been placed upon " this power by the constitution must, it is true, be carefully guarded.

" If an attempt to exercise it, not for governmental, but for private " purposes, such attempt may be held void by the judicial courts, al- " though not coming under any direct constitutional inhibition, for there " are certain implied reservations of rights in every free government " which the Legislature cannot take away." (*Loan Association vs. To-* " *peka*, 20 *Wall*, 655.)

" But so vital a power to the safety and well-being of the State is to " be exercised within a wide range of legislative discretion, and is not " to be hedged about or hampered by unnecessary restrictions imposed " by the judicial courts. We hold, therefore, that the defendant was " not entitled to notice, within the meaning of the word as employed " in his answer, of the act of the Court of Appeals of the County " of St. Louis in raising the assessed valuation of its property, as in its " answer stated. We also hold that the Assessors and the Board, or " either of them, had power so to raise it. It results from this that " the demurrer to the answer was well taken, and that the judgment " sustaining it must be affirmed."

In *Weimer vs. Banberry*, 30 *Mich.*, 211 *and* 216, Justice Cooley is peculiarly clear and strong on this question. He says:

"There is nothing in these words, however, that necessarily implies "that due process of law must be judicial process. Much of the pro- "cess, by means of which the Government is carried on and the order "of society maintained, is purely *executive* or administrative. Tempo- "rary deprivations of liberty or property must often take place through "the action of ministerial or executive officers of functionaries, or even "of private parties, where it has never been supposed that the common "law would afford redress. One in whose presence a felony is com- "mitted is in duty bound to restrain the offender of his liberty without "waiting for a magistrate's warrant (4 Bl. Com., 292–3); and the "traveler who finds the public way founderous crosses the adjacent "fields without fear of legal consequences. * * * Our laws for the "exercise of eminent domain protect parties in going upon private "grounds for the preliminary examinations and surveys. It may be "said that in none of these cases is the deprivation final or permanent, "but that is immaterial. The constitution is as clearly violated when "the citizen is unlawfully deprived of his liberty or property for a "single hour as when it is taken away altogether.

"There are unquestionably cases in which expressions have been "used, implying the necessity for a common-law trial before, in any "instance, a man can be deprived of his property; but they will be "found, on investigation, to be cases calling for no such sweeping state- "ment. If any court has ever decided that judicial proceedings are of "constitutional necessity in appropriating property under the power of "taxation, the case has not been brought to our attention, and has been "overlooked in our investigations.

"This would be most extraordinary if the necessity existed, for tax "systems similar to our own have prevailed ever since our government "was founded, and it can not be said that tax laws are usually so pop- "ular as to disarm every person of any legal objections which he might "suppose available to relieve him of their burdens. On the contrary, "no laws are contested more vigorously, and with none are people "more critical in looking after defects and infirmities. It may be "safely asserted, without fear of contradiction, that if the collection of "the revenue could only be made through legal proceedings, the true "principle would not have been left to so late a discovery, but the "wheels of government would long ago have been blocked by litig- "ious parties until an entirely new system could be substituted.

"And it need hardly be said that any new system, in which the "courts should be made the administrators of the revenue, would neces- "sarily be so cumbrous and so subject to impediments and delays as to "make a constitutional provision requiring it a great public incon- "venience. * * *

"We are, therefore, of necessity driven to an examination of the "previous condition of things if we would understand the meaning of "due process of law as the constitution employs the term. Nothing "previously in use, regarded as necessary in government and sanc- "tioned by usage, can be looked upon as condemned by it. Adminis- "trative process of the customary sort is as much due process of law "as judicial process. We should meet a great many suspected and "very serious embarrassments in government, if this were otherwise.

"The words, it has very justly been said, were intended to secure "the individual from the arbitrary exercise of the powers of govern- "ment, unrestrained by the established principles of private rights and "distributive justice.

"It has been said with especial reference to process for collection of "taxes, that any legal process which was originally founded in neces- "sity, has been consecrated by time, and approved and acquiesced in "by universal consent, must be considered an exception to the right of "trial by jury and embraced in the alternative law of the land. * * * "In *Rockwell vs. Nearing*, 35 N. Y., 308, which is quoted for defendant "in error as sustaining his position, the opposite view is very distinctly "taken. There are, says Porter, J., many examples of summary pro- "ceedings which were recognized as due process of law at the date of the "constitution, and to these the prohibition has no application. * * * "A day in court is a matter of right in judicial proceedings, but "administrative proceedings rest upon different principles.

"The party affected by them may always test their validity by a "suit instituted for the purpose, and this is supposed to give him ample "protection. To require that the action of the government, in every "instance where it touches the right of the individual citizen, shall be "preceded by a judicial order or sentence after hearing, would be to "give to the judiciary a supremacy in the State and seriously to im- "pair and impede the efficiency of executive action."

So in *Griffin vs. Dagon & Martin*, 48 *Miss., pages* 17 *to* 43 and in *Doe ex dem, Gladney, etc., vs. Devens*, 11 *Georgia*, 82, the same doctrine is clearly announced. The same doctrine is recognized in *People vs. Brooklyn*, 4 *N. Y.*, 419; 31 *N. Y.*, 579; 2 *Dutch.* 398; 37 *Mo.* 44; 8 *Hirsk.*, 550; 24 *American Decisions*, 542.

From all of these authorities Mr. Cooley, in his work on Taxation, pages 39 and 40, deduces the following general doctrine:

"That the *mode* of levying, as well as the right of imposing taxes, "is completely and exclusively within the legislative power, which, it is "to be presumed, will always be exercised with an equal regard to the "security of the public and individual rights and convenience. The "existence of government depending on the prompt and regular collec- "tion of revenue, must, as an object of primary importance, be insured "in such a way as the Legislature may prescribe. There is a tacit con- "dition connected with the ownership of property that it shall contrib- "ute to the public revenue in such mode and proportion as the legislative "will shall direct; and if the officers intrusted with the execution of "the laws transcend their powers to the injury of an individual, the "common law entitles him to redress. But to pursue every delinquent "liable to pay taxes, through the forms of process and a jury trial, "would materially impede, if not wholly obstruct, the collection of rev- "enue. There is no room for the supposition that in a matter of this "public importance, where promptness in collection is always desirable, "and often imperative, dilatory proceedings of this nature were within "the contemplation of the people, when consenting to any general pro- "vision of the constitution. It is safer, and, as we believe, more correct, "to say that our constitutions have been framed and agreed upon in

'view of an immemorial practice and rule of government under which "the whole subject has been intrusted to the legislative department; "and they are to be understood and construed in the light of that prac- "tice wherever the people have not expressly undertaken to change it."

It is true that Mr. Cooley, in his work on Taxation, page 365, in discussing this question of right of hearing at some stage of the proceedings, says in substance, that such right should be, and generally is, given by the statute, but he nowhere says that in the absence of such right given by the statute, that the act would be unconstitutional, or that the courts would have a right to so declare it, and he cites no case in which the courts have so declared it. Again, in discussing the limitations on the taxing power, beginning on page 41, and enumerating in detail these limitations, he nowhere refers to the right of notice, hearing, or appeal as a condition of the constitutionality of a revenue act, or as a limitation on the law-making power, and no case is cited in support of such a doctrine.

What is the history of the legislation in this State, and our customs and traditions in regard to this matter? This clause was in the first constitution of Kentucky, and yet the first Legislature that ever assembled provided a system of tax laws, and left entirely out of sight any right of notice, hearing, or appeal on assessments, or any other step from levying to collecting, and though the system was often amended, it was many years before such rights were recognized by the law. These again were repealed and again re-enacted, and two-thirds of our existence as a State has passed with the courts and the people acquiescing in this custom of construction of our constitution and of abstract constitutional principles.

Even as late as 1873 and up to 1878 no right of hearing, notice, or appeal existed in any case for the general tax-payer. By common consent, by universal custom and acquiescence, though every man in the State was interested, and had his attention annually called to the subject, this right of hearing and appeal was regulated by legislative will, and due process of law was construed not to embrace the administrative proceedings of the State to collect her revenue; or rather, "due process of law" was assured and complete when the representatives of the people had expressed their will. Again, for many years our statutes arbitrarily assessed all real estate as of three grades in value, and by name designated the counties which should be the criterion of assessment and value.

Even as late as 1856, and for many years afterward (see Revised Statutes), real estate was taxed only 17 cents, and personal estate was taxed 30 cents. In this State the power to specially assess and tax without regard to actual value has always existed, and been recognized as within the legislative discretion.

Corporations have generally been taxed so much on their shares of stock, without the slightest regard to value. Turnpikes worth $500 per share of stock were taxed no more than those worth $5 per share. Others have been taxed on their profits, and others exempted altogether, even out of their class. Railroads have been taxed in various ways; sometimes by assessment and sometimes specifically. These assessments have sometimes been made by the agents of the law, and at other times by legislative act. In 1864, and for years afterward, all of the railroad property of the State was *by the law assessed at twenty thousand dollars per mile.* This was an arbitrary fixing of values without hearing, notice, or appeal, and I may add, without regard to the actual value of each individual road, for some were worth twenty times as much as others. Three times has this act been before this court, and each time approved.

In 7th Bush, 255, *L. C. & L. R. R. vs. The Commonwealth*, the constitutionality of this act was substantially affirmed, while in 10th Bush, page 49, with the constitutionality of this act directly in issue, as shown by the briefs and the opinion, this Court, in terms, said its constitutionality is not to be questioned.

In the cases of *Lexington vs. McQuillon's Heirs*, *9th Dana*, 516; *Louisville vs. Hyatt*, *2d B. M.*, 177; *Howell vs. Bristol*, *8th Bush*, 493; *Marshall vs. Donovan*, *10th Bush*, 681; *Preston vs. Roberts*, *12th Bush*, 570, all relied on by appellants as established the doctrine of equality and uniformity in taxation, it will be seen that the question involved was one of *local*, and not general taxation. The question of notice or hearing was not discussed, and the court goes no further even in these cases than to apply the rule of equality and uniformity to "classes," and in the cases at bar it can not be contended there is not equality and uniformity as to the class.

The Fourteenth Amendment to the Constitution provides—

"That no state shall make or enforce laws which shall abridge the "privileges or immunities of citizens of the United States, nor shall "any state deprive any person of life, liberty or property without due "process of law, nor deny to any person within its jurisdiction the "equal protection of the laws."

Can it be seriously contended that this amendment is violated by the revenue act under discussion, or that this amendment is a limitation upon the right and power of the state to apportion, levy, assess and collect her taxes as she has always done?

The power of the state in the whole question of regulating and apportioning its taxes has uniformly been held unlimited.

In *McCulloch vs. the State of Maryland*, 4 *Whiot, page* 428, Mr. Chief Justice Marshall most aptly says:

"Before we proceed to examine this argument and to subject it to "the test of the constitution, we must be permitted to bestow a few "considerations on the nature and extent of this original right of tax- "ation, which is acknowledged to remain with the states. It is admit- "ted that the power of taxing the people and their property is essential "to the very existence of government, and may be legitimately exer- "cised on the objects to which it is applicable to the utmost extent to "which the Government may choose to carry it. The only security "against the abuse of this power is found in the structure of the gov- "ernment itself. In imposing a tax, the Legislature acts on its constit- "uents. This is in general a sufficient security against erroneous and "oppressive taxation."

"The people of a state, therefore, give to their government a right "of taxing themselves and their property, and as the exigencies of "government cannot be limited, they prescribe no limit to the exercise "of this right, resting confidently on the interest of the legislator and "the influence of the constituents over their representative to guard "them against its abuse."

"But the means employed by the Government of the Union have "no such security, nor is the right of a State to tax them sustained by "the same theory. Those means are not given by the people of a par- "ticular State nor given by the constituents of the Legislature, which "claim the right to tax them, but by the people of all the States. They "are given by all for the benefit of all, and upon theory should be sub- "jected to that government only which belongs to all."

"It may be objected to this deffinition that the power of taxation is "not confined to the people and property of a State. It may be ex- "ercised upon every object brought within its jurisdiction. This is "true, but to what source do we trace this right? It is obvious that it "is an incident of sovereignty, and is co-extensive with that to which "it is an incident. All subjects over which the sovereign power of a "State extends on objects of taxation, but those over which it does not "extend are upon the soundest principles exempt from taxation. This "proposition may almost be pronounced self-evident. The sovereignty "of a State extends to everything which exists by its own authority or "is introduced by its permission."

In *Youngblood vs. Sexton*, 32 *Mich., page* 415, Cooley, Justice, said:

"The question whether a tax is just and equal or not, is not a "question of law; and this will meet any objection to the law based upon

"the fact that other kinds of business are not similarly taxed. *Ap-*
" *portionment of taxation is purely a legislative function.*"

In the case of *Providence Bank vs. Billings & Pittman*, 4 *Peters*, 563, the court says:

"The power of legislation, and consequently of taxation, operates on "all the persons and property belonging to the body-politic. This is "an original principal, which has its foundation in society itself. It is "granted by all for the benefit of all. It resides in government as a "part of itself, and need not be reserved when property of any de-"scription, or the right to use it in any manner is granted to individuals "or corporate bodies. However absolute the right of an individual "may be, it is still in the nature of that right that it must bear a por-"tion of the public burthens; *and that portion must be determined by the* "*Legislature.* This vital power may be abused; but the Constitution of "the United States was not intended to furnish the corrective for every "abuse of power which may be committed by the State Governments. "The interest, wisdom, and justice of the representative body, and its "relations with its constituents, furnish the only security, where there "is no express contract, against unjust and excessive taxation, as well "as against unwise legislation generally."

So in the case of *St. Louis vs. The Ferry Company*, 11 *Wallace, page* 429, it was said:

"It has been said that the power of taxation for the purposes of the "Commonwealth is a part of all governmental sovereignty, and is in-"separable from it. *It is for the Legislature to decide what persons and* "*property shall be reached by the exercise of this function, and in what* "*proportions, and by what process and instrumentalities taxes shall be as-*"*sessed and collected.*

"The authority extends over all persons and property within the "sphere of its territorial jurisdiction. When called into activity there "can be no limit to the degree of its exercise except what is found in "the wisdom of the law-making power and the operation of those "conservative principles which lie at the foundation of all free govern-"ment."

In the case of *State Tax on Foreign held Bonds*, 15 *Wall., p.* 319, Mr. Justice Field, speaking upon this general subject, said:

"The power of taxation, however vast in its character and search-"ing in its extent, is necessarily limited to subjects within the juris-"diction of the State. These subjects are persons and business. "Whatever form taxation may assume, whether as duties, imposts, ex-"cises, or licenses, it must relate to one of these subjects. It is not pos-"sible to conceive of any other, though as applied to them the taxation "may be exercised in a great variety of ways.

"It may touch property in any shape, in its natural condition, in "its manufactured form, and in its various transmutations; *and the* "*amount of taxation may be determined by the value of the property, or its* "*use, or its capacity, or its productiveness.* It may touch business in the "almost infinite forms in which it is conducted, in professions, in com-"merce, in manufactures, and in transportation. Unless restrained by

" provisions of the Federal constitution, the power of the State as to the " mode, form, and extent of taxation is unlimited, where the subjects to " which it applies are within her jurisdiction."

Justice Harlan, in the case of Kirtland vs. Hotchkiss, 10 Otto, p. 409, decided since the adoption of the fourteenth amendment, sanctioned and approved the doctrine laid down in the foregoing decisions, thus virtually deciding that the fourteenth amendment was not intended to destroy the principle that regulated the taxing powers of the State that had been determined to exist prior to the adoption of the amendment.

It must be a conceded fact that before the adoption of the fourteenth amendment the taxing power of the State was in no sense limited by the Federal Constitution. That it was absolute and unlimited.

This power, exercised by the States from the beginning, upon a principle underlying the ground-work and structure of our government, recognized by the courts and sanctioned by unvarying usage, we do not think was destroyed by the adoption of the fourteenth amendment.

The powers of the Government of the United States are limited to those expressly given by the constitution, or granted by necessary implication.

Cooley's Constitutional Limitations, p. 10:

"Nor shall any State deprive any person of life, liberty, or property, " without due process of law; nor deny to any person within its juris- " diction the equal protection of its laws."

In construing this amendment, reference must be had to the causes which led up to it. Its history is written in blood, and it was evolved from the smoke and fire of a terrible war. The relation of the State and Federal governments and their respective powers and duties, though sharply defined and well understood, was on one single subject in dispute. The right of secession, growing out of the sovereignty of the State, and the power of coercion, resulting from the right of the general government to maintain its existence, was an unsettled question. One section was demanding additional safeguards for the protection of African slavery, while the other demanded its curtailment and extinction. This resulted in war that settled the single open question, involving the rights of the State and the powers of the general government, and emancipation of the slaves followed.

Is there anything in this history that would demonstrate that the intent of this amendment was to put a limitation upon *all* of the legis-

lative powers of the State. That it was to control the legislation of the States pertaining to their local affairs or to limit their powers to the passage only of such laws as would operate equally upon all persons, and particularly to prevent the enactment of such tax laws as would not operate with unequality.

Was it intended to obliterate all of the lines which had hitherto distinguished the powers of the State and Federal Government, and to revolutionize the whole theory as it had existed and been determined from the organization of the Government?

That it was so designed is a conclusion unreasonable indeed. But this court has reviewed the history of this amendment in the Slaughter House cases, 16 Wall, page 70, the court says:

* * * * * * * * * * * *

"The process of restoring to their proper relations with the Federal "Government and with the other States, those which had sided with "the rebellion, undertaken under the proclamation of President Jack- "son in 1865, and before the assembling of Congress developed the fact "that, notwithstanding the formal recognition by those States of the "abolition of slavery, the condition of the slave race would, without "further protection of the Federal Government, be almost as bad as it "was before. Among the first acts of legislation adopted by several of "the States in the legislative bodies, which claimed to be in their nor- "mal relations with the Federal Government, were laws which im- "posed on the colored race onerous disabilities and burdens, and cur- "tailed their rights in the pursuit of life, liberty and property to such "an extent that their freedom was of little value, while they had lost "the protection they had received from their former owners from both "of interest and humanity. They were in some States forbidden to "appear in the towns in any other character than menial servants. "They were required to reside on and cultivate the soil without the "right to purchase or own it. They were excluded from many oc- "cupations of gain, and were not permitted to give testimony in the "courts in any case where a white man was a party. It was said "that their lives were at the mercy of bad men, either because the "laws for their protection were insufficient or were not enforced. "These circumstances, whatever of falsehood or misconception may "have been mingled with their presentation, forced upon the statesmen "who had conducted the Federal Government in safety through the "crisis of the rebellion, and who supposed that by the thirteenth "article of amendment they had secured the result of their labors, "the conviction that something more was necessary in the way of "constitutional protection to the unfortunate race who had suffered so "much. They accordingly passed through Congress the proposition "for the fourteenth amendment, and they declined to treat as restored "to their full participation in the government of the United States "which had been in insurrection, until they ratified that article by a "formal vote of their legislative bodies."

From this it is clear that the object of the amendment was to secure the civil rights of the citizens and naturalized persons residing within the several States.

This construction was immediately after its adoption.

Its very language, in connection with the reasons and influences that brought about its adoption, is conclusive of the construction intended. Its language is not in express terms a limitation on the legislative powers of the State, and no construction would be admissible that would confer upon the Government of the United States the right to determine how a State should impose or apportion its taxes.

Its language is that no State "shall deny to any person" within its jurisdiction the equal protection of its laws.

It assumes the existence of laws, the equal protection of which, it says, shall not be denied to any person within the jurisdiction of the State.

Surely this was not intended to mean that no State should pass any law that would operate with inequality upon any person within its jurisdiction.

The plain inducement and reason for the amendment was to secure the negro in his civil rights. He was, in fact, denied his rights as a citizen. He could not testify, and thereby protect himself in the courts, hence the peculiar language which prevents a denial to any persons, "an equal protection of the laws."

The object was to correct a patent existing, and admitted wrong to the negro, and an evil to society. It was to clothe him with the right to appear in court, to testify, to contract and hold property, and do other things necessary to give him the protection of such laws as had been or might be passed.

Where is the boundary line, if this is not the full limit of the intention of this amendment?

Laws which might be enacted by the States in the exercise of their legislative power, heretofore conceded to be exclusive and unlimited, would all be the subjects of Federal inquiry as to their equal or unequal operation.

Would there be left to the State any power over any subject, if that power was limited by this provision in such manner as to require absolute equality in the operation of the laws passed, and when, after the

passage of the law, it would be the subject of inquiry as to the equality of its operation?

Again I quote from the Slaughter House cases, 16 Wall, p. 77:

"It would be the vainest show of learning to attempt to prove by "citations of authority that up to the adoption of the recent amend- "ments no claim or pretense was set up that those rights depended on "the Federal Government for their existence or protection, beyond the "very few express limitations which the Federal Constitution imposed "upon the States, such for instance, as the prohibition against *expost* "*facto* laws, bills of attainder, and laws impairing the obligation of "contracts."

"But with the exception of these, and a few other restrictions, the "entire domain of the privileges and immunities of citizens of them "States, as above defined, lay within the constitutional and legislative "power of the States, and without that of the Federal Government.

"Was it the purpose of the fourteenth amendment, by the simple "declaration that no State should make or enforce any law which shall "abridge the privileges and immunities of *citizens of the United States*, to "transfer the security and protection of all the civil rights which we "have mentioned from the States to the Federal Government? And "where it declared that Congress shall have the power to enforce that "article, was it intended to bring within the power of Congress the en- "tire domain of civil rights heretofore belonging exclusively to the "States? All this and more must follow, if the proposition of the plain- "tiffs in error be sound. For, not only are these rights subject to the "control of Congress whenever, in its discretion, any of them are sup- "posed to be abridged by State legislation, but that body may also pass "laws in advance, limiting and restricting the exercise of legislative "power by the States, in their most ordinary and usual functions, as in "its judgment it may think proper, on all such subjects. And still fur- "ther, such a construction, followed by the reversal of the judgment of "the Supreme Court of Louisiana in these cases, would constitute this "court a perpetual censor upon all legislation of the States on the civil "rights of their own citizens, with authority to nullify such as it did not "approve as consistent with those rights as they existed at the time of "the adoption of this amendment."

"The argument, we admit, is not always the most conclusive which is "drawn from the consequences urged against the adoption of a particu- "lar construction of an instrument."

"But when, as in the case before us, these consequences are so serious, "so far-reaching and pervading, so great a departure from the structure "and spirit of our institutions; when the effect is to fetter and degrade "the State governments by subjecting them to the control of Congress in "the exercise of powers heretofore universally conceded to them of the "most ordinary and fundamental character; when, in fact, it radically "changes the whole theory of the relations of the State and Federal "goverments to each other, and of both these governments to the peo- "ple, the argument has a force that is irresistable, in the absence of "language which expresses such a purpose too clearly to admit of "doubt."

"We are convinced that no such results were intended by Congress, "which proposed these amendments, nor by the legislatures, which rati- "fied them."

From language so clear and strong the conclusion is inevitable that this Court does not understand the amendment to invest the Federal Government with jurisdiction to limit the legislative power of the State beyond remedying the evils that suggested the necessity for its adoption, or *evils of a like kind*, to which the amendment can be applied as a safe and proper remedy.

It is provided in sec. 5 of the amendment that "Congress shall have "power to enforce, by appropriate legislation, the provisions of this "article."

If the whole question of the operation of the laws equally upon all citizens, is the subject of Congressional control, as was aptly said in the Slaughter House cases. "Not only are these rights subject to the control "of Congress whenever, in its descretion, any of them are supposed to be "prejudicial by legislation, but that body may pass laws in advance lim-"iting and restricting the exercise of legislative powers by the States "in their most ordinary and usual functions, as in its judgment it may "think proper on all subjects."

If this amendment was intended to limit the power of the State in providing a revenue system, then Congress has the power to enforce by appropriate legislation, the enactment of such tax systems by the States as will operate in such manner, as to that body may seem to produce equality. Congress may command the equality of taxation and then, of course, may determine what constitutes equality. This ignores the well settled question determined by an unbroken line of decisions and by universal acquiescence founded on the accepted theory of the relation of the States to the general government.

That is, that to the legislative department of the State was entrusted as a necessity the right to lay and appropriate taxes for State purposes. If, therefore, Congress may provide for the enforcement of the equality of taxation, where is the limit to the discretion whereby the end of securing equality is obtained. Might Congress not declare, that to secure equality, all lands should be taxed at a uniform rate per acre, and that all classes of property should be taxed by the piece. Congress could wipe out exemptions of educational, religious, and charitable institutions, because these exemptions result in inequality. Congress could regulate all questions of license tax as well as the value of franchises, grants and corporate powers and privileges bestowed, given and created by the Legislatures of the States. Thus Congress would regulate all questions of domestic policy and the police power of the State.

With such power and such legislation by Congress would necessarily exist, jurisdiction in the Federal courts in all cases to determine whether

or not a tax laid by a State met the requirements of the Constitution of the United States, and the acts of Congress made in pursuance thereof. Thus the power of the state legislatures would be taken away and the jurisdiction of the State courts destroyed. As said in the Slaughter House cases such a construction "would constitute this court a perpetual censor upon legislation of the States" upon the subject of these tax systems, "with authority to nullify such as it did not approve" as consistent with the Constitution of the United States and the several acts of Congress made in pursuance thereof.

To take from the State governments all legislative discretion in the determination of their policy, in matters of taxation, would be to strike down every attribute of sovereignty, and with it to cancel every reserved right. That this was contemplated by one amendment to the Constitution of the United States, expressed in five lines, and that does not purport to give to the Federal Government any specific additional powers, is simply preposterous.

The origin, growth and history of our people, loving their liberties, reserving to themselves the right of self-government, by entrusting only their immediate and closest representatives with the management and control of their local and domestic concerns, carefully guarding this principle by a distinct reservation of all rights and powers not specifically granted, absolutely forbids the conclusion and repels even the suggestion that by this amendment it was intended to surrender the very life-principle of our free government, and to reverse political axioms accepted by all and sacredly guarded for more than a century.

The absolute impossibility of forming general laws to meet the exigencies of every conceivable case, and especially the impossibility of framing revenue laws that operate with perfect equality upon all, because of the infinite variety, classes, and conditions of property and subjects of taxation, renders it absolutely necessary that to the legislative departments should be committed large discretionary powers.

It has never been deemed necessary, under any constitution or government, to levy taxes with absolute uniformity, or to have revenue laws that operate with perfect equality upon all, and such will ever be an unattainable end. To illustrate the folly of the position assumed by plaintiffs in error, permit us to call the attention of the court to an act of the General Assembly of the Commonwealth of Kentucky, passed since the decision of these cases. See acts of 1883–4, vol. 1, p. 151.

This act creates a Board of Equalization, and is almost a counterpart of the Illinois law, reviewed by this court in the State railroad cases heretofore referred to.

This Board is authorized to meet and equalize the assessments of all property in all of the counties of the State, except railroad property, over which it has no power whatever, that being left to the Board created for that purpose by the former law.

For two years this Board has met and has increased the assessed value of the property of many counties in the State from 30 to 50 per cent.—some of these counties through which the plaintiffs roads run. Without notice, hearing or right of appeal, every tax-payers assessment has been increased, and every dollar's worth of property has been added to fifty per cent., except the property of railroad companies. That remains as assessed by the Board created for that purpose. The citizen reports his property; the Assessor values it at his own discretion; the county board meets and increases it, or on appeal to the county court it is judicially determined, yet the State Board may meet and without notice, hearing or appeal, increase it at its pleasure. Is not the discrimination here against the citizen and in favor of the roads? and, if plaintiffs in error now succeed on the grounds assigned, may not every tax-payer in the State next successfully repudiate our whole revenue system on like grounds of discrimination, inequality, and want of notice?

This court cannot give us a tax law, and Congress has not, if it could. Nor can this court lay down for legislstive guidance in its judicial utterances or otherwise general principles, whereby perfect uniformity in the methods and modes of assessment or perfect equality in the burdens of taxation can be attained. The principle contended for by plaintiffs in error, if it relieves the roads now, because of discrimination, or want of notice, or hearing, will release every tax-paying citizen in Kentucky on the next appeal, for like reasons, and so, too, if the Federal government is to take jurisdiction of the subject of taxation in the States, in so far as to see that, in the methods and modes and subjects of taxation, uniformity and equality is maintained, when it is safe to assert that there is not a State in the Union whose tax system would stand the test of uniformity and equality, nor would that of the Federal Government itself, it would not be more unreasonable than for the government to undertake to secure uniformity and equality between the States themselves, or between the citizens of all the States.

As said in *Cooley on Taxation, pages* 126 and 127:

"The sum of the matter is, that the taxing power must be left to "that part of the government which is to exercise it. But what if this "power were so managed as to lay the public burthens on particular "classes in ease of the rest? It is illogical to argue from an extreme "case, or from the abuse of a power to the negative of it. Every "authority, however indispensable, may be abused, and if it might not, "it would be powerless for good."

"'Perfectly equal taxation,' it has again been said, 'will remain an "unattainable good as long as laws and government and man are im-"imperfect.' There is no provision in the constitution that taxation "shall be equal. Sound policy requires that it should be, so far as "possible. But perfect equality is not possible. Indeed, if this was "necessary, there could be no taxation except such as would include "every person and every thing, which would be manifestly impractica-"ble and unjust.

"These are strong expressions, but they do not go beyond the de-"mands of strict accuracy."

Again says Mr. Cooley, page 33:

"It is still more manifest that the power to tax is not judicial. 'It "is the province of the judicial power to decide private disputes be-"tween, or concerning persons, but of legislative power to regulate "public concerns, and to make laws for the benefit and welfare of the "State.' 'The legislative makes, and the executive executes, and the "judiciary construes the laws' The legislature must therefore deter-"mine all questions of State necessity, discretion, or policy involved in "ordering a tax and in apportioning it; must make all the necessary "rules and regulations which are to be observed in order to produce "the desired returns, and must decide upon the agencies by means by "which collections shall be made. 'The judicial tribunals of the State "have no concern with the policy of legislation. That is a matter "resting altogether in the discretion of another co-ordinate branch of "the government. The judicial power cannot legitimately question "the policy or refuse to sanction the provisions of any law not incon-"sistent with the fundamental law of the State.' And it is as incom-"petent for the Legislature to confer the power to tax upon the "judiciary as upon the executive. If the Legislature shall abuse its "powers and transcend its legislative functions by the enactment of "that which is called a tax law, but which is not such in fact, then in-"deed the abuse may be arrested by the judicial arm; but the "inference does not proceed or the idea of any authority of the judiciary "over the subject of taxation. The judiciary interposes on the applica-"tion of any party whose rights are threatened by an unlawful exer-"cise of authority, and it is immaterial with whom or what depart-"ment the unlawful action originates, or by what name it is designated. "But so long as the legislation is not colorable merely, but confined to "the enactment of what is in its nature strictly a tax law, and so long "as none of the constitutional rights are violated in the directions for "enforcing the tax, the legislation is of supreme authority. Taxes "may be, and often are, oppressive to the persons and corporations "taxed; they may appear to the judicial mind unjust, and even un-"necessary, but this can constitute no reason for judicial interference."

But in the State Railroad cases, 11 Otto, page 611, while the facts were, as in the case at bar, the court said:

"As to section 1, we need not inquire very closely whether the mode "adopted by the statute and by the rules of the Board of Equalization "produced a valuation for railroad companies different from that of "individuals, though, as we have already said, it does not appear to us "to produce any inequality to the prejudice of the companies. But we "need not pursue that inquiry very closely, because the latter part of "the section in express terms authorizes the legislature to tax 'persons "or corporations owning or using franchises in such manner as it shall "from time to time direct, by general law,' and the only restriction on "the power, as applied to this class, is, that it shall be 'uniform as to "the class upon which it operates.' There can be no doubt that all "the classes named in this clause, including peddlers, showmen, inn-"keepers, ferries, express, insurance, and telegraph companies, are taken "out of the general rule of uniformity prescribed by the first clause, "and the only limitations as to them is that of uniformity as to the "class upon which the law shall operate; that is, inn-keepers may be "taxed by one, ferries by another, railroads by another, provided that "the rule as to inn-keepers be uniform as to all inn-keepers, the rule as "to ferries uniform as to all ferries, and the rule as to railroad com-"panies be uniform as to all railroad companies. As we have seen no "evidence treat the rule by which railroad property is taxed is not uni-"form in its action on all the railroad companies in Illinois, we can "perceive no opposition to the constitution of the State in that rule.

"But suppose it were otherwise; perfect equality and perfect uni-"formity of taxation as regards individuals, or corporations, is a dream "unrealized.

"It may be admitted that the system which most nearly attains "this is the best. But the most complete system which can be devised "must, when we consider the immense variety of subjects which it "necessarily embraces, be imperfect. And when we come to its appli-"cation to the property of all the citizens, and of those who are not "citizens, in all the localities of a large State like Illinois, the applica-"tion being made by men whose judgments and opinions must vary, "as they are affected by all the circumstances brought to bear upon "each individual, the result must inevitably partake largely of the im-"perfections of human nature, and of the evidence upon which human "nature is founded. * * * * * * *

"In the examination which we have made of the cases, we do not "find any of the matters complained of to come within the rule which "we have laid down as justifying the interposition of a court of equity. "There is no violation of the constitution, either in the statute or in its "administration, by the Board of Equalization. No property is taxed "that is not legally liable to taxation, nor is the rule of uniformity "prescribed by the constitution violated.

But we insist that the plaintiffs in error accepted their charter subject to the provisions of the act of 1856, *which act reserved to the State the right to amend or repeal at will all charters and grants of or to corporations, or amendments thereto.*

That the State might have attached any conditions to any grant or charter, or to any corporations created by her, is a proposition too plain to be argued.

Corporate existence is purely the offspring of legislative grant. Their being comes by the grace of the sovereign power of the State, and in no sense results from natural conditions; every right they exercise is a gift and a concession, at the will of the law-making power. Hence, every corporation that has come into being since 1856 accepted existence with the conditions, responsibilities and liabilities of that act attaching, unless relieved from it by the terms of the act creating it.

It would be competent for the Legislature to provide for the whole revenue of the State by the creation of a system of coporations. One of the conditions of the existence of every corporation created might be that fifty per cent. of their earnings be paid to the State.

If, then, the act of 1856 be a part of all corporations since created, why may not the plaintiffs in error all be subject to legislation that does not take away or destroy their vested rights? The pleadings in these cases admit there was no spoliation. They admit the tax imposed was reasonable. They admit they had actual notice, and, in fact, a hearing, before the Board. They admit there was no fraud. They admit everything except that the law is technically offensive to them, and they do not and can not show to this court a vested right that has been interfered with. If so, from whence was the vested right derived? They do not show it in their charters. From the amendment to the Constitution? If so, then this same amendment would apply to all future charters, grants and acts of incorporation, and this would result in denying to a State the right or power to create a corporation with any conditions as to taxation, and the perplexing question might then be asked, what is to become of the rights, privileges and conditions as to taxation that now exist in the multitude of grants and corporate franchises that operate about us every day?

In the case of *Hage vs. The Railroad Company*, 9 *Otte, p.* 354, Mr. Justice Field said:

"By the law of 1841 every charter of a corporation in South Caro-
"lina subsequently granted, amended or modified, was subject to repeal,
"amendment or modification by the Legislature, unless specially ex-
"cepted from such legislative control, in the act granting the charter, or
"amendment, or modification. Such is evidently the meaning of the
"forty-first section of that law, though the intention is inaptly ex-
"pressed. This construction is somewhat different from that placed

"upon it in *Tomlinson vs. Jessup*, reported in 15 *Wallace*, and gives the "Legislature a more extended control; but it is the construction to "which a more careful examination of the language has led us. By it "the Legislature said that subsequent charters should be subject to re- "peal or amendment, unless they were in express terms excepted from "its control in the act granting them, and that existing charters, if sub- "sequently amended or modified should stand in the same position. "Its provisions constituted the condition upon which every charter was "afterwards granted, amended or modified. They formed as much a "part of the new or amended charter, as if they had been originally "embraced in it."

See also *Stone vs. Mississippi*, 11 *Otto, p.* 814.

Said Chief Justice Breese, in the case of *Ducat vs. The City of Chicago*, 48 Illinois, page 179:

"These passages, from that opinion, settle us in our convictions that "corporations have no status in States, as citizens of the State creating "them, and when they come into the State to do business and make "profits, a discrimination can be rightfully made between them and our "domestic corporations of the same character; that, if it should be "deemed good policy by the Legislature, they could be so taxed, or "otherwise burdened, as to compel them to leave the State. They may "be regarded as a benefit or nuisance, according to the caprice of the "Legislature; they not being citizens in any approved sense of that "term, which can be correctly understood in no other sense than that "in which it was understood in common acceptation, when the con- "stitution was adopted, and it is universally explained by writers on "government, without an exception. A citizen is of the *genus homo*, "inhabiting, and having certain rights in some State or district. Such "a being, if a citizen of New York or any other State of this Union "is, for many purposes, a citizen of this State, and of all the other "States, and is entitled to all such privileges and immunities within "the purview of the constitution as the citizens of those States, perma- "nently residing therein, are entitled to. These are personal privileges, "many of which are specified in the case of *Corfield vs. Coryell*, 4 *Wash. C. C. R.*, 371, cited opprovingly by appellant.

"These privileges attach to him in every State into which he may "enter as a human being—as a person with faculties to appreciate them, "and enjoy them, not to an intangibility, a mere legal entity, an invisi- "ble artificial being, but to the man, made in God's image.

"The individual citizen has the power of moving from place to "place, as his business or pleasure may prompt. He has rights "which are so important as to make it desirable that they should be uniform throughout this broad and expanded Union, which, in order "to promote mutual friendship and free social, or business intercourse "among the people of the several States, were placed by this clause of "article 4, under the protection of the Federal Government. In the "case of corporations, no such reasons exist. Corporations in the "States of their creation are not entitled to the privileges, or 'rights' "as appellant claims, of the citizens of such States. They cannot vote "at elections—they are ineligible to any public office—they cannot be "executors, administrators, or guardians! They are artificial beings; "endowed with only such powers, privileges, and rights as their

"creator thought proper to bestow upon them. They have not the "power of locomotion, and of course are not fit subjects, in the view "above expressed of the constitutional clause on which this cause "turns."

"Not being able to go into the States of the Union at their corporate "will and pleasure and exercise their faculties therein, they cannot, by "any reasonable and just view of that clause be deemed as coming "within its spirit or object."

"This tax of two dollars imposed on these companies is not a tax on "the persons or property of the corporators of the stockholders. It is "the artificial being, the mere legal entity which is taxed, and the tax "is paid out of the funds of the corporation. The immunity claimed "by appellant is claimed on behalf of the corporation as such, and not "in behalf of the individual stockholders, and can not be allowed."

"As was said by the Supreme Court of New Jersey in *Tatum vs. "Wright, et. al.*, 3 *Zabriskie* 129, the business transacted by the appel- "lants is the business of several corporations whom he represents, and "although the several stockholders are interested in that business, and "their business may be affected by the taxes imposed, yet, as they "choose to transact it through the medium of an incorporated name, "having no personal character or rights, and not properly within the "designation of a citizen, they must take their charters with all the "disabilities properly belonging to them, one of which is, if an incor- "poration goes beyond the limits of the sovereignty which creates it, it "must submit to such terms as other sovereignties see fit to impose."

Angel and Ames on corportions, 11 *Ecl., Sec.* 767.

Reverting again to the question of the right of notice and hearing, we commend the State railroad cases decided by the Supreme Court of the United States, and reported in 92 U. S. Rep., page 575, to the especial attention of the court. Exactly the same questions were raised in those cases that are raised in the cases here. The statute providing a method of taxation for the railroads was in substance the same as here. The requirement of the companies as to reporting, and the duties of the commissioners in regard to valuing and assessing, were the same as here. That act failed to provide for notice, hearing, or appeal. The Board of Equalization raised the assessments from two to four hundred per cent. higher than was reported by the companies. As a whole, in the essential features of those cases and the cases here, there was no difference.

The questions and issues and principles involved were identical. The only difference discovered by counsel for appellants in argument was, that the Constitution of Illinois authorized the Legislature to tax persons and corporations owning or using franchises in such manner as it shall, from time to time, direct by general law.

This is a distinction that does not touch the issues or affect the principles involved.

This provision certainly did not authorize the Legislature to tax railroad companies in an unlawful or unconstitutional way. It did not warrant the Legislature in robbing them of their constitutional right of hearing or notice, if such be constitutional rights.

The Legislature had inherently all of the rights as to taxation before, that it had after, the adoption of this constitutional provision. In fact, the constitution of Illinois, but provided limitations on the legislative power of taxation, and in no sense enlarged its powers, while in Kentucky the constitution has put no limitations on the taxing power whatever. The whole question of taxation, as to its subjects, its methods and modes of assessments and collections, has been left to the representatives of the people, untrammeled by constitutional enactment. How can it be said, then, that a Kentucky Legislature has less power over the question of taxation than the Legislature of Illinois has, or how can it be said that the Legislature of Illinois has any more authority to pass an unconstitutional law than the Legislature of Kentucky has? The constitution of Illinois has the same provision that ours has; forbidding the taking of life, liberty, or property, except by due process of law. These same cases were decided by the Supreme Court of Illinois, before they were passed on by the Supreme Court of the United States. In *Porter and others vs. R. R. I. & St. L. R. R. Co.*, 76 *Illinois Rep., page* 598, the court said:

"Some further objections are urged on the ground that the corporations were not notified of the meeting of the Board of Equalization, or of its intention to adopt the rule by which the assessments were made, and that no right of appeal was allowed. The constitution does not provide that the Legislature shall require the persons or corporations, whose property shall be assessed for taxation, shall be notified of the assessment, or the rules adopted whereby to determine the value of the property, or that there shall be allowed the right of appeal in such cases. These matters address themselves purely to the discretion of the Legislature. The law, as it is made, is, in this respect, conclusive."

In these same cases, reported in 92 United States Supreme Court Reports, page 575, the court, on pages 609 and 610, says:

"The statute requires the proper officers of the railroad company to furnish to the State Auditor a schedule of the various elements already mentioned as necessary in applying the statutory rule of valuation. It is charged that the Board of Equalization increased the estimates of value so reported to the Auditor, without notice to the

"companies, and without sufficient evidence that it ought to be done; "and it is strenuously urged upon us that, for want of notice, the whole "assessment of property and levy of taxes is void. It is hard to be- "lieve that such a proposition can be seriously made. If the increased "valuation of property by the Board, without notice, is void as to rail- "road companies, it must be equally void as to every other owner of "property in the State, when the value assessed upon it by the local "assessor has been increased by the Board of Equalization. How much "tax would thus be rendered void it is impossible to say. The main "function of this Board is to equalize these assessments over the whole "State. If any find that a county has had its property assessed too "high in reference to the general standard, they may reduce its valua- "tion; if it has been fixed too low, they raise it to that standard. "When they raise it in any county, they necessarily raise it on the "property of every individual who owns any in that county. Must "each of these have notice and a separate hearing? If a railroad com- "pany is by law entitled to such notice, surely every individual is "equally entitled to it. Yet, it this is so, the expense of giving notice, "the delay of hearing each individual, would render the exercise of the "main function of this Board impossible.

"The very moment you come to apply to the individual the right "claimed by the corporation in this case, its absurdity is apparent. "Nor is there any hardship in the matter. *This Board has its time of "sitting fixed by law. Its sessions are not secret. No obstruction exists to "the appearance of any one before it to assert a right or redress a wrong; "and, in the business of assessing taxes, this is all that can be reasonably "asked.*"

And again, on page 618, speaking of the cases decided by the Supreme Court of Illinois, the Court says:

"It is, nevertheless, a satisfaction that our judgment concurs with "that of the State, and leads us to the same conclusion."

In the case of the *Gulf Railroad vs. Means*, reported in *7th Kansas, page* 210, another railroad tax case, with almost exactly the same statutory provisions in relation to assessment and valuation, the same questions were made, and the Court held the parties were not entitled to notice, and, if they were, the law fixing a time for the Board to meet was a sufficient notice.

In *Adsit vs. Leib*, 76 *Ill., page* 199, the court holds the same doctrine as to notice or right of notice.

Again, we claim that the word person, as used in the amendment, does not embrace corporations.

In the case of the Insurance Company vs. the city of New Orleans, 1 Woods, U. S. C. C. Reports, page 85, Woods J., delivering the opinion of the court said:

"The first question presented for adjudication is, admitting the tax "to be unequal, is the ordinance providing for its levy and enforcement

"in violation of the first section of the fourteenth amendment to the "Constitution of the United States, especially the last clause of that "section, which reads as follows: "All persons born or naturalized in "the United States and subject to the jurisdiction thereof, are citizens "of the United States and of the State wherein they reside. No State "shall make or enforce any law which shall abridge the privilege or "immunity of citizens of the United States, nor shall any State deprive "any person of life, liberty or property without due process of law, nor "deny to any person within its jurisdiction the equal protection of its "laws."

"The complainant, to be entitled to the protection of this constitu-"tional provision, must be either a citizen of the United States, or a "person in the sense in which that term is used in this section.

"It has been repeatedly held by the Supreme Court of the United "States that corporations were not citizens of the several States in such "sense as to bring them within the protection of the Constitution of the "United States, (section 2 article 4) which discloses that the citizens "of each State shall be entitled to all the privileges and immunities of "citizens of the several States. *Bank of Augusta vs. Earle*, 13 *Peters*, "586. *Paul vs. Virginia*, 8 *Wallace*, 177. Are corporations citizens "of the United States within the meaning of the constitutional pro-"vision now under consideration? It was claimed in argument that "before the adoption of the fourteenth amendment, to be a citizen of "United States, it was necessary to become a citizen of one of the "States, but that since the 14th amendment this is reversed and that "citizenship in a State is the result and consequence of the condition of "citizenship of the United States.

"Admitting this view to be correct, we do not see its bearing upon "the question in issue. Who are citizens of the United States within "the meaning of the fourteenth amendment, we think is clearly settled "by the terms of the amendment itself. All persons born and natural-"ized in the United States and subject to the jurisdiction thereof, are "citizens of the United States and the State wherein they reside.

"No words could make it any clearer that citizens of the United "States within the meaning of this article, must be natural and not "artificial persons, for a corporation can not be said to be born, nor can "it be naturalized. I am clear, therefore, that a corporate body is not "a citizen of the United States as the term is used in the fourteenth "amendment.

"Are corporations, persons wihin the meaning of the same amend-"ment?"

"The word persons occurs three times in the first section, in the "following connections: 'All persons born or naturalized in the "United States.' 'Nor shall any State deprive any person of life, "liberty, or property, etc.' 'Nor shall any State deny to any person "within its jurisdiction the equal protection of its laws.' The com-"plainants claim that this last clause applies to corporations—artificial "persons."

"Only natural persons can be born or naturalized. Only natural "persons can be deprived of life or liberty. So that it is clear that "artificial persons are excluded from the provisions of the first two "clauses quoted. If we adopt the construction claimed by complain-"ants, we must hold that the word person, where it occurs the third

"time in this section, has a wider and more comprehensive meaning "than in the other clauses of the sections where it occurs. This would "be a construction for which we find no warrant in the rules of inter- "pretation."

"The plain and evident meaning of the section is, that the persons to "whom the equal protection of the law is secured, are persons born, or "naturalized, or endowed with life and liberty, and, consequently, "natural and not artificial persons."

"This construction is strengthened by the history of the submission "by Congress and the adoption by the States of the fourteenth amend- "ment, so fresh in all the minds as to need no rehearsal. We are of "opinion, therefore, that the ordinance of the City of New Orleans is "not in violation of the provisions of the Fourteenth Amendment of "the Constitution of the United States."

But other reasons might have been given. To call a corporation a person, is a strained, and at best, secondary use of the term conventionally created, and, presumably, if the word person had been intended to mean both natural and artificial persons, the amendment would have plainly said so.

Aside from the mere verbal construction of the amendment, there was no reason, when it was adopted, and there is none now, why there should be taken from the States powers heretofore exclusively their own, and powers which had been exercised in all of the States only on the reserved condition that the control of corportations (their own creations) should remain with them. Immense aggregations of capital, operating under corporate privileges, may become oppressive to the people and absolutely dangerous to the safety of the Government. Hence the necessity for the reservation of the right to alter, repeal or amend at will by the Legislatures of the States. But, concede, for the sake of argument, that this clause of the constitution applies to corporations, what is the result? The amendment would be made to read, "No State shall pass any law that operates with inequality, and every law shall operate with absolute equality upon all persons, whether natural or artificial." By the very creation of corporations they are invested with rights, powers and privileges that are denied to natural persons, and the act creating them is itself a discrimination against natural persons.

But it is argued that corporations are made up of natural persons, and that, therefore, when you touch corporations you affect the persons that compose it. Then we say that the creation of the corporation is a discrimination in behalf of the persons that compose it, and against the natural persons that make up the great body of society.

After accepting a legal existence as an artificial being, with all of the extraordinary rights, powers and privileges conferred by the act creating them, corporations, by this constitutional amendment, are also to be clothed with all of the rights of citizens or relieved of all disabilities that the general law may impose, or protected against discriminations or laws operating unequally. Then the creature is greater than the creator, and an artificial entity is of more importance in the eye of the law than the living, breathing, soulful being we call a citizen.

If this amendment is to be construed as contended for by plaintiffs in error, and the word *person* is to mean or include a corporation, then would it not be a discrimination for a State to say that a corporation should not make a promissory note, while a citizen or natural person could, or that a corporation should not hold real estate, or to limit it in the amount it might hold? If the amendment means that all laws must operate with equality, what right would a State have to put any limitation whatever on a corporation that is not put on a natural person? If, in the cases at bar, the word person in the amendment is to be construed to include corporations, then jurisdictional boundary lines are wiped out, and, in vain speculation and conjecture, we are lost as to how, when and where they will be established again.

Without reviewing the positions assumed in this case, and, we trust and believe, fully sustained by the authorities, we now assert that the act in question did provide for notice and a hearing; that the notice was a reasonable one, and just such a notice as is provided for the ordinary citizen under the general revenue law; that it did provide for a hearing, and just such a hearing as the ordinary citizen has; that the notice and hearing was a reasonable and sufficient one, and adapted to the administrative proceeding, purpose, and end to be secured.

Conceding, for the sake of the argument, that railroads are real estate, and should be taxed as real estate, it must be apparent at a glance that it would be eminently unjust and inequitable to the roads themselves to assess them as ordinary real estate is assessed. In fact, it would be absolutely impossible to thus assess them with even approximate fairness.

None of the criteria of values within the tangible reach of the County Assessor, as to ordinary real estate, apply to railroads, for what would a road be worth cut up into sections, measured by the county lines through which the road runs? They generally run through

many counties, and even States; their rolling stock to-day is in Kentucky, to-morrow it is in New Orleans or Pittsburg. Their franchise, an unreal and intangible right, valuable as it brings profit or secures advantage, has no habitation or fixed location; yet it has a market value capable of estimate. Neither has the commerce, trade, travel, or profits of the road, location or place. How, then, could a County Assessor estimate the value of that part of the road within his jurisdiction, as he would ordinary real estate, when the traffic, and profit of the road out of his county, and perhaps out of his State, together with the franchise and other agents and incidents beyond his jurisdiction, constitute the real measures of value?

Seeing, then, the absolute necessity for some plan of assessment different from that for assessing ordinary real and personal property, the inquiry arises, is the method provided in the act of 1878 a reasonable, just and fair one, and appropriate to the end to be accomplished?

For the assessment of the ordinary property of the citizen, the law has very appropriately and properly provided three steps—

First.—A listing of the property with the Assessor by the citizen himself, if he be in the county.

Second.—A fixing of the value and actually assessing by the Assessor of the county.

Third.—A meeting of the Board of Equalization with power to raise or lower the assessment already made.

There are but two steps provided by law in the plan of assessment of railroad property, and no more is essential to justice or fairness, and no more would be appropriate or practicable. These steps are—

First.—A full report by the company of the length of its road, both in and out of this State, and its average value per mile, with a list of all of its engines, cars, depot grounds, real estate, improvements, and incidents; or upon their failure to report, these facts to be ascertained by the Auditor.

Second.—A meeting of the Board of Equalization on a day fixed by law to consider and determine the question of value.

It will be seen that the difference in these two plans results from the necessities of the case. There are more than three hundred thousand men in the State to be taxed, whose property consists of millions of items, while there are not a dozen roads.

Hence, these men are not required to report directly to the Board of

Equalization, but the law appropriately sends to them an Assessor to take their lists. It will be observed that, under the law, this Assessor is in no sense bound by the list given to him by the citizen. He may hear proof, investigate, and examine for himself; and, acting upon his own knowledge, determine and fix the value—all in the absence of the citizen, with no time nor place fixed by law for him to hear proof, investigate, or act upon his own knowledge. He is not even required to let the citizen know what valuation he will fix or has fixed upon his property. Of all of this the citizen must take notice for himself. Suppose the Assessor should fix the value five times higher than it was reported, or assess property not listed. The citizen has not yet had a hearing, because the law has fixed no time or place for the Assessor to hear proof, or receive information, or act upon his own knowledge. Hence his only remedy is to follow up the Assessor, and examine his books after they are returned. *Then he must take notice of the time and place fixed by law for the meeting of the Board.*

And permit me to say here, that there is not a word, line, or section in the law regulating the duties of the supervisors, that imposes on them the duty of hearing any citizen who may desire to be heard. It is only inferable from the nature of their duties and office. This much in answer to the argument that the railroad tax law does not, in terms, provide for a hearing of the companies. It is true that, under the amendment of 1878, the County Board of Supervisors cannot raise the already assessed value of a citizen's property without notice. Prior to that time they could, and why is this? It is simply because, in this three-fold process of assessment appropriate to the end to be attained, one of the sworn agents of the law selected to do justice between the citizen and the State, has already acted upon his oath and his judgment. It would be in the nature of the case eminently unjust for the State to repudiate the act of the sworn agent of her own selecting, without a notice. But in the two-fold process of assessing railroad property, a process appropriate and proper, no sworn agent of the State has acted on the question of value before the Board meets. It is their duty to assess, not alter assessments. The report of the companies to the Auditor was no more an assessment than the report of the citizen to the Assessor was an assessment. If the Auditor had been clothed with the power to assess, after these reports were made to him, then the Board would have acted on an actual assessment. But the Auditor

has no power to assess; he simply returns the reports as he receives them to the Board, and then they *assess and equalize* the values.

The law has fully prescribed the duties of this Board. Of this the plaintiffs in error were as much bound to take notice as they were of the duty imposed on them to report. The law has fixed the time and the place, naming even the house in which the Board is to meet, to consider and determine, and fix the values, with authority to examine the books and the property of the companies, unlike the itinerant County Assessor, who has no day nor time nor place fixed by law for him to hear proof, receive information, or act upon his own judgment.

This Board must meet on a given day, time, and place, in a public office, in the capital of the State, and act as the sworn agent and arbiter between the Commonwealth and the Railroad Companies on the question of value. Is this not a reasonable and sufficient notice? Is it not the same notice that the ordinary citizen has whose property has been assessed too high in his absence and behind his back?

Appellants were bound to take notice, and did take notice, of the duties imposed on them by this act. Were they not equally bound to take notice of the duties imposed on the Board in which they were interested, the day, time, and place being fixed by the law? The pleadings admit they did take notice, and they did have a hearing. By all of the analogies of the law this notice was sufficient. In *ex parte* proceedings generally notice must be taken of the sitting of the courts. Magistrates and ministerial officers, whose duty it is to make reports to the courts, must take notice of their terms. When the law fixes a time and place for the Sheriff to receive taxes, or a school commissioner to hear application, or for any ministerial, executive, or judicial officer to perform a duty of the time and place so designated, all parties in interest *must* take notice.

The Supreme Courts of Illinois and Kansas, and the Supreme Court of the United States, in the cases heretofore referred to, which were identical with these cases, decided this notice sufficient. The custom of the country has construed the same notice as to the meeting of the County Board sufficient. The ordinary tax-payer, aggrieved at too high an assessment, must take the same notice. The Board of Railroad Commissioners, and the appellants themselves, recognized the same construction, and will this court construe it otherwise?

It certainly can not be contended that it is essential to the constitu-

tional rights of appellants that they should have a hearing after the assessment. As well might they say a party should have a hearing after the verdict of a jury.

In this summary administrative proceeding the office of the board is similar to that of a jury, they are fairly and impartially on their oaths to find a fact, and, according to their best judgment, fix the values. If, before this finding, appellants had an opportunity to be heard, they have had their day in court, as applied to these necessarily summary processes.

To allow an appeal to another board would but multiply remedies where one is complete, and would but subject the rights of the parties to the same fallible test—human judgment and discretion. The right to tax being conceded, there is no room for a question of law. It is but a simple question of values, and appeals are not matters of constitutional, but statutory right.

Cooley, in his work on Taxation, page 127, says:

"Perfect equal taxation, it has again been *said, will remain an unat-*
"*tainable good as long as laws and government and men are imperfect.*
"There is no provision in the constitution that it shall be equal."

And again, on page 126, he says:

"*The sum of the matter is, that the taxing power must be left to that*
"*part of the Government which is to exercise it;* but what if this power
"were so managed as to lay the public burdens on particular classes, in
"ease of the rest? It is illogical to argue from an extreme case, or
"from the abuse of power to the negative of it. Every authority, how-
"ever indispensable, may be abused, and if it might not, it would be
"powerless for good."

The question has been asked in argument, what if this Board should, through malice or prejudice, arbitrarily oppress the railroads? Our answer is, that their oath and duty requires them to determine the question of value as impartial agents, according to their best judgment and discretion. If they decide the matter through malice or prejudice, and not their judgment, it is fraud, and a court of equity will grant relief. So says Cooley, page —. But might not the same question be asked of every other executive, ministerial, or judicial officer in the Commonwealth?

Much has been said about the *arbitrary* power of this *irresponsible* Board. How arbitrary and irresponsible—how?

They are by the law "*three disinterested freeholders,*" selected by the

Chief Executive, and confirmed by the Senate, and presumably so selected for their intelligence and integrity.

They are sworn to discharge their duties faithfully, and under their solemn oaths they are honestly and fairly, by their best judgment, to determine the question of value, and assess the roads for taxation.

What better guarantee from prejudice, malice, fraud, or oppression is given the citizen, even in the organization of the highest court in the land?

The same presumptions attach in favor of the honesty, integrity, and fair dealings of these officers, that attach to all other officers in the State, be they executive, ministerial or judicial.

The appellants had their day in court before them, not only in fact, but as a matter of right. The law gave the notice, it fixed a time and place convenient and public, with full notice that then and there this Board would set to hear and determine the question of values and assessment between the Commonwealth and all railroad companies in the State, and that this Board was to act under oath and to the best of its judgment. Suppose the act had said: and of this meeting of the Board all railroad companies shall take notice, and come forward and be heard, would it have made the common intent, aim, and purpose of the act, as manifest on its face, any plainer than it is now? Would the notice have been more complete? Would appellant's abstract constitutional rights have been better secured?

It is a rule of construction, universally recognized, that the courts will resolve all doubts in favor of the constitutionality of a statute.

As coming within this rule, if a statute is capable of a construction, bringing it within the boundary line of constitutional sanction, it should be so construed.

Unless there be something in the act that of itself excludes the parties from a hearing, all presumptions should and must be indulged, that it was intended to operate to secure justice and the constitutional rights of the parties.

I need not argue that this statute is capable of such a construction. It is upon its face its plain meaning and common intent. If doubt there be at all, it is to the possibility of any other construction.

If fixing a day, time, and place *meant nothing*, then why were not the commissioners left to select their own time and place? The parties themselves construed this as notice, and a sufficient notice. The com-

missioners and the railroad companies all construed the act as giving them a hearing, *and they had a hearing*. If, by the construction of the ministerial officers whose duties are involved in the act, and by the construction of those interested whose rights are involved, the law has been sanctioned as constitutional; if there was nothing more, it seems to me a saving doubt would be raised in the mind of the court. In fact, this is conclusive that the law, as understood by those connected with and interested in its operation, does secure to appellants their so-called constitutional rights. This court would hardly construe an ordinary contract, no matter what its language, different from what the parties in interest had understood it to mean and acted upon, and especially so when their construction was in harmony with justice and fair dealing. How much less would they be warranted in construing unconstitutional a statute law, the subject-matter of which was purely within the *domain of legislative discretion;* that was, and is, by those connected with, and interested in its operation, construed to secure the rights of the parties and the ends of justice. Whether this understanding and construction results from the general intent and purpose of the act, as manifest on its face, the customs of the country, the analogies of the law, the common understanding of the people, as applied to the established summary administrative processes for collecting the public revenues, it matters not. It is the law, as understood and acted upon by the people. Justice is attained, and strict technical constitutional right secured.

In the face of all of this, plaintiffs in error, with a show of patriotic devotion to the great abstract principles of constitutional right, that is both unique and suggestive, comes and asks this court to apply a contracted cast-iron rule of construction, already repudiated by themselves, the officers, and the people. Corporate existence is not the result of natural conditions. They are legal entities, with peculiar privileges, the result of legislative grant. Born of the generosity of the State, they live by virtue of her sufferance and generous protection.

From bantlings, liberally endowed with peculiar powers and privileges, they have grown great and strong, and sometimes oppressive in their greed and love of gain. The same power that brought them into existence might have, and may now, attach such conditions to that existence as it sees proper to as to taxation, for it is conceded that there is no limit to the specific taxation of a franchise.

Yet these corporations, seeking no relief from actual injury, refuse to bear their just share of the public burdens, and are the first—though from the beginning the rights of the citizen have been no better guarded, and generally far less so—to put themselves on record, asking the courts to maintain what they term an abstract right by asserting a principle which would disorder the Executive, Legislative, and Judicial balance so aptly adjusted, and lay the life of the State at the feet of the Judiciary.

With an earnest conviction in the right of the positions assumed, whether in the press of official duties, in the time allowed me they have been presented as clearly as they might be, or not, I yet, with confidence, most respectfully ask an affirmance of these cases.

P. W. HARDIN,

Attorney General.

115-321

In the Supreme Court of the United States.

TERM, 1885.

CINCINATTI, N. O. & TEXAS PACIFIC R. R. Co.
vs.
THE COMMONWEALTH OF KENTUCKY. } No. 818.

LOUISVILLE & NASVILLE R. R. Co.
vs.
THE SAME. } No. 819.

CHESAPEAKE, OHIO & SOUTH WESTERN R. R. Co.
vs.
THE SAME. } No. 820.

These cases are all appeals from the Court of Appeals, of the Commonwealth of Kentucky, and involve the same question.

The appellants are Rail Road Companies owning and operating nearly all of the rail roads in the State of Kentucky.

The appellee, the Commonwealth of Kentucky, instituted these several suits in the Fiscal Court of the State for the recovery of taxes due her on the assessed property of the appellants for the year 1883, and obtained judgments aggregating dollars.

From these judgments appellants appealed to the Court of Appeals, of Kentucky, which Court affirmed the judgments below. They then appealed to this Court.

Appellants claim that the act under which they were assessed for taxation is in violation of the Constitution of the United States, and have since 1882 refused to pay the State the taxes assessed against them. The effect of these appeals is to stay the State in the collection of her revenues, and to prevent for an indefinite period the enforcement of a proper and just contribution upon the part of appellants to the support and maintenance of the Government.

Her powers to collect the revenues and taxes absolutely necessary and essential to her support and existence as a State are thus suspended, thereby involving grave public interests.

Already by reason of the suspension of the collection of these revenues the State is unable to pay her ordinary and legitimate expenses, and great and irreparable injury will result to her by reason of delay in determining the questions involved in these appeals.

The State is entirely without remedy for the existing injury and the accumulating evils, and the public welfare is seriously involved. For these reasons the appellee moves the Court to advance the hearing in each of the above causes so that a speedy decision may be had.

Neither of the appellants make objection, and the written consent of the Louisville & Nashville R. R. Co. is herewith filed.

P. W. HARDIN,
Attorney-General of Ky.